133-315

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1164.

C. H. SMITH AND BENJAMIN FORDYCE, PLAINTIFFS IN ERROR,

vs.

O. T. LYON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 10, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1164.

C. H. SMITH AND BENJAMIN FORDYCE, PLAINTIFFS IN ERROR,

vs.

O. T. LYON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	2
Caption	3	3
Petition	3	3
Exhibit A—Agreement between Britton & Lyon and C. H. Smith & Co., June 1, 1887	4	4
Exhibit B—Agreement between Britton & Lyon and C. H. Smith & Co., July 1, 1887	20	13
Summons	35	22
Marshal's return	37	22
Amended petition	38	23
Motion to dismiss for want of jurisdiction	46	28
Order taking motion under advisement	47	29
Judgment	48	29
Motion for rehearing	48	29
Order denying motion for rehearing	49	30
Order allowing writ of error, &c.	50	30
Bill of exceptions	50	30
Motion to dismiss	51	31
Bond	53	31
Opinion of the court	54	32
Clerk's certificate	57	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 28, 1889.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1889, thereof, between C. H. Smith and Benjamin Fordyce, plaintiffs, against O. T. Lyon, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, in this, that the said circuit court dismissed said plaintiffs' cause of action for want of jurisdiction in said court to entertain the same, because of the non-residence of one of the persons plaintiff in the district where said suit was brought, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 8th day of June next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this ninth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, dated as aforesaid.

A. P. SELBY,
Clerk Circuit Court United States, Eastern Division of the Eastern Judicial District of Missouri.

Allowed by—
AMOS M. THAYER,
District Judge.

{Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.}

[Endorsed:] No. 2987. United States circuit court, eastern division of the eastern judicial district of Missouri. C. H. Smith *et al. vs.* O. T. Lyon. Writ of error to the circuit court of the United States, eastern division, eastern judicial district of Missouri. Returned and filed 9th day of May, 1889. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the
Eastern Judicial District of Missouri, } ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 24th day of May, A. D. 1889.

A. P. SELBY,
Clerk of said Court.

2 The United States of America to O. T. Lyon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, wherein C. H. Smith and Benjamin Fordyce are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the circuit court of the United States for the eastern district of Missouri, this — day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

AMOS M. THAYER,
Judge United States District Court, Eastern Division,
Eastern Judicial District of Missouri.

Service of this citation is hereby acknowledged this 13th day of May, 1889.

O. T. LYON,
Def't in Error,
By R. C. FOSTER,
His Att'y.

[Endorsed:] No. 2987. United States circuit court, eastern division of the eastern judicial district of Missouri. C. H. Smith *et al.* *vs.* O. T. Lyon. Citation. Filed May 9th, 1889. A. P. Selby, clerk. Please send me copy of your brief, when made, & oblige.

3 UNITED STATES OF AMERICA,
Eastern Division of the
Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said Division of said District.

Be it remembered that on the fifteenth day of September, A. D. 1888, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri a certain petition, in words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1889.

C. H. SMITH & BENJAMIN FORDYCE, Plaintiffs,
vs.
O. T. LYON, Defendant.

Petition.

At this time come the plaintiffs herein and for their cause of action against the defendant state that they are partners doing business under the firm name of C. H. Smith & Company. The said C. H. Smith is a resident and citizen of St. Louis, State of Missouri, and the said Benjamin Fordyce is a resident and citizen of Hot Springs, State of Arkansas.

That the defendant, O. T. Lyon, is a resident and citizen of Sherman, State of Texas; that heretofore, on the 1st day of July, 1887, the said defendant, together with one James H. Britton, who has since deceased, but who was then a partner of said Lyon, entered into a contract with plaintiffs, under the name and style of C. H. Smith & Company to construct a railroad from Commerce, in the county of Hunt, in the State of Texas, thence in a south-
3½ westerly direction to Ft. Worth, in the county of Tarrant, in said State, a distance of about one hundred miles, a copy of which said contract is herewith filed and made a part of this petition and declaration; and the plaintiffs state that they have kept and performed all the conditions of said contract on their part and have fulfilled the same, but the defendant, on the contrary, has failed and refused to carry out and execute said contract on his part, but has broken and violated the same in the manner following, to wit—that is to say, the said contract required defendant to complete said work on the first day of November, 1887, whereas said defendant failed to complete said work on said day or at any time whatsoever, but wholly failed and refused so to do, and on the 13th day of January, 1888, explicitly refused to execute and carry out said contract. It is further alleged that in and by said contract said defendant, in connection with his partner, said Jas. H. Britton, undertook, promised, and agreed at their own proper charge and expense to pay for all the construction, earth-work, and materials for grading,

and also to furnish all the materials and pay for the same for bridging and trestling upon said line, and to save the railway company, for whom said construction was done, from all liens of any kind on account of labor or materials furnished therefor, and when said work was completed under said contract to receive the prices and sums named in said contract therefor, but that said defendant has wholly failed and refused to carry out said contract and to comply with the terms thereof; that on the 13th day of January, 1888, — refused to further carry on said work and perform the same according to said contract, and wholly failed and refused before that time to pay for the materials furnished and labor performed upon the work already done,
4 and plaintiffs were compelled to and did complete said work at greatly increased expense; that plaintiffs have been compelled to pay and have paid on account of liens for work and labor and materials which defendant was required under said contract to pay the sum of $13,500.00, and to complete the said line and pay for the work, labor, and materials necessary to complete the same after the refusal of said defendant to do so under the terms of his said contract plaintiffs have been compelled to pay in excess of the sums required by said contract to be paid the sum of $10,000.00, and in consequence thereof are damaged the sum of $23,500.00. Plaintiffs further allege that in and by said contract said line was to have been completed on or before the first day of November, 1887, and that in consequence of the delay occasioned by the non-compliance by the defendant with the terms thereof plaintiff has been further damaged in the sum of $13,000.00, which resulted directly from the delay on the part of the defendant to complete said work at the time the same was agreed. Plaintiffs therefore pray judgment against the defendant in the sum of $36,500, for which sum, together with all costs, they pray judgment.

JEFFERSON CHANDLER, *G'n'l Sol.*
PHILIPS & STEWART, *G'n'l Att'ys.*

EXHIBIT "A" TO PETITION.

This agreement, made and entered into this first day of June, one thousand eight hundred and eighty-seven, by and between James H. Britton and O. T. Lyon, constituting the firm of Britton & Lyon, of Sherman, Texas, party of the first part, and C. H. Smith & Co., St. Louis, Mo., party of the second part, witnesseth:

5 That, for and in consideration of the payments hereinafter mentioned to be made by the said party of the second part, the party of the first part hereby covenants and agrees and binds their heirs, executors, administrators, and assigns, strictly in accordance with the terms of this agreement and the proposition of the party of the first part herein incorporated and forming a part of this agreement, and under the direction of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, and under his supervision and control to furnish the materials and do the work, opposite which prices are affixed, pertaining to the graduation and masonry of sections 1 to 98, both inclusive, of the Fort

Worth extension of the St. L., A. & T. R'y in Texas between Commerce and Fort Worth and such work as may be properly connected therewith or incident thereto, and complete the same in all its parts as follows: November first, 1887.

The time of completion of the same being an essential part of the contract and it being expressly understood and agreed as follows: That all measurements made by the said chief engineer or his assistants shall be considered and accepted as correct, full, and final; that the prices affixed shall be accepted as full consideration for labor performed and materials furnished; that no extra charges will be claimed or allowed on account of changes, either in line or grade of the road; that if any damage shall be done by the party of the first part or persons in their employ to the owner or occupant of land or other property adjoining or in the vicinity of the work herein contracted to be done the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas shall have the right to estimate the amount of said damage and to pay the same to said owner or occupant, and the amount so paid for such damage shall be de-
6 ducted from the value of the work done under this contract.

That all roads for hauling materials and ways to and from the work; also all grounds for the deposit of materials and the erection of shanties or yards for the performance of the work not within the limits of the right of way of the railroad, shall be provided for by the party of the first part at their own proper charge and expense.

Whenever the route of the railroad is traversed by public or private roads commodious passing places must be kept open and in safe condition for use; and in passing through farms the party of the first part must also keep up such temporary fences as will be necessary for the preservation of crops.

On or about the first day of each month during the progress of the work an estimate shall be made of the relative value of the work done, to be judged of by the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, and upon his certificate of the amount being presented to the party of the second part or such disbursing agent as he may appoint eighty-five per cent. of the amount of said estimate shall be paid to said party of the first part at St. Louis: Provided, however, that the said party of the first part shall furnish the party of the second part or his agent, on or about the tenth day of each month, a sworn statement of the amount owed by him for labor, materials, and supplies up to the end of the month preceding such statement; and when all the work embraced in this contract is completed agreeably to the specifications and in accordance with the directions and to the satisfaction and acceptance of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas there shall be a final estimate of the quantity, quality, character, and value of said work, agree-
7 ably to the terms of this agreement, when the balance appearing due to said party of the first part shall be paid to them upon their giving a release under seal to the said party of the second part, and a sworn statement that all obligations due for

labor and materials have been paid. Monthly estimates to be paid on or about the twentieth (20th) day of each month. It is agreed that all materials used in the construction of the work under this contract and all the work done under it shall be subject to the inspection and approval of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, and all materials condemned by him shall be removed to such distance as said engineer shall deem necessary in order to prevent the same from being used in said work, and all condemned work shall be taken down and rebuilt or the chief engineer may at his option permit it to remain and make such deduction from the contract price herein agreed upon as he, the said chief engineer, considers just and proper on account of its not being constructed in accordance with the requirements of this contract.

It is further understood that none but competent foremen, mechanics, and workmen shall be employed upon said work, and any person or persons whom the party of the second part or the president or chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas considers to be incompetent or disorderly or disposed to make mischief or difficulty shall be immediately discharged by the party of the first part, and shall not afterwards be employed upon said work without the consent, in writing, of the party of the second part or the president or the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas.

8 No part of the work to be performed under this contract shall be sublet without the consent of the party of the second part or the president or chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, given in writing, and no such written consent shall release the party of the first part from any obligations, either to the party of the second part or the persons employed by such sub-contractor, and in all such cases the sub-contractors will be considered merely in the light of foremen employed by the party of the first part and liable to be discharged by the party of the second part or by the president or chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas for incompetency, neglect of duty, or misconduct, and the party of the first part shall see that all persons employed by any sub-contractor are regularly and promptly paid, the same as if they were employed directly by the party of the first part. It is also agreed that the party of the second part or the St. Louis, Arkansas and Texas Railway Company in Texas may, whenever he or it deem it proper and expedient so to do, pay to the laborers or other persons employed by said party of the first part, and of any moneys due for any monthly and other estimate, any sums due to them for labor or service performed for said party of the first part under this contract, and the sums so paid shall be charged to the party of the first part as so much money paid to them on this contract.

To insure prompt and speedy action and save the party of the second part from loss from any cause whatsoever, the party of the second part reserves the right to order and direct the work to be prosecuted at such points as the chief engineer may designate, and

to order such force worked at such points as he may deem necessary to complete the work to be done under this contract in the
9 shortest possible time, and should the party of the first part fail to comply with said order by neglecting or refusing to employ such force as the party of the second part or the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas shall direct, or fail at any time or in anywise to prosecute the work in such a manner as, in the opinion of the said chief engineer, to give reasonable assurance of the completion of the whole or any part of the work within the time limited in this contract, or should the party of the first part persist in doing any of said work in an improper manner or in employing improper persons or in neglecting or evading the performance of their obligations under this contract in any manner, then the party of the second part or the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, after giving three days' written notice to the person in charge without the evil complained of being corrected to their entire satisfaction, may declare this contract forfeited, and in such case all the rights of the party of the first part under this contract shall from thenceforth cease and be determined; that the party of the second part may thereupon proceed to take possession of and relet the work comprised herein to other parties the same as if this contract had never existed; and in case this contract is declared forfeited, as herein provided, the fifteen per cent. retained by the party of the second part from the monthly estimates shall be forfeited absolutely to said party of the second part and the party of the first part shall have no claim whatever to the same; and the party of the first part agrees to give peaceable and immediate possession of all said work to the party of the second part or his authorized agents.

The parties to this contract hereby mutually agree that the
10 chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas shall be the sole judge and arbiter in all cases of disagreement, difficulty, or dispute as to the quality or amount of work performed under this contract, and also in relation to all matters of difference that may arise between the parties hereto in relation to or touching the proper performance of any or all the conditions thereof; and his decision, given in writing, shall be in the nature of an award, and the same shall be as conclusive upon and between the parties hereto as a final judgment in a court of competent jurisdiction and no appeal shall be taken or suit instituted or prosecuted in any court to set aside or contest the same or to readjust or question the validity or correctness of any matter upon which he has passed.

Whenever all the work required under this contract or any continuous five miles shall be fully completed to the satisfaction and acceptance of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas said party of the second part — accept the same, said engineer giving said first party a certificate of his acceptance.

In case any or all the work embraced in this contract shall be suspended by and on account of the party of the second part, which it

is hereby agreed the party of the second part may do, for other causes than heretofore provided in this contract, then, in that case, all further operations under this contract shall be suspended within thirty days after receiving written notice from the party of the second part requiring the further progress of the work to be suspended, and that party of the first part shall receive full pay for all work done by them, performed under this contract, and at the prices herein stipulated upon the estimate of the said chief engineer, which shall
11 be final and conclusive between the parties to this contract; which estimate shall not include any anticipated profits that might have accrued from the completion of the said work, it being understood that no claim for damages shall be made by the party of the first part on account of any profits that might have accrued from the completion of the same.

The supervision, powers, and control given in this contract to the president and chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas by the parties thereto over the work, labor, and materials to be furnished thereto are conferred in order that the railway being constructed in part under the same may be kept free from laborers, mechanics, and other liens and incumbrances.

The St. L., A. & T. R'y in Texas to furnish free transportation over its line in Texas for men and tools needed in the prosecution of the work under this contract going to the work.

Proposition.

The undersigned propose, under the direction of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, or his assistants or either of them, and under their supervision and control, to do all necessary work and furnish all the required material to complete the graduation and masonry of the Fort Worth Extension of the St. L., A. & T. R'y in Texas between Commerce and Fort Worth, section 1 to 98, both inclusive, as specified below, and in conformity with the specifications and conditions imposed and plans from time to time furnished, binding themselves, should such proposition be accepted, to commence work within ten (10) days thereafter and to prosecute the same with all due diligence, to the end that such contract shall be finished complete in all parts by the first day of November, one thousand eight hundred
12 and eighty-seven, and for such work done and materials furnished the following prices are affixed, and will be accepted by them as full, complete, and entire compensation for the same; and, further, that all measurements, classifications, and calculations made by the said chief engineer or his assistants shall be considered and accepted as correct, full, and final:

For grubbing, to be paid at eighty-five (85) dollars per acre, with the understanding that all trees and stumps shall be grubbed and removed from all excavations for the roadway and from embankments under three (3) feet in height, and that pay for grubbing will be expected only where there are trees and stumps to be grubbed.

For clearing, twenty (20) dollars per acre, with the understanding that whatever designated by the said chief engineer or his assistants the entire surface of the right of way shall be cleared of all trees, logs and brush, or other perishable material, except such logs or trees as may be needed for the construction of said railroad, which shall be left in piles convenient for use.

For excavation of earth, including, if required, an extreme haul of —— feet, twelve and ¾ (12¾) cents.

Earth excavation shall embrace all excavated material not included in the classes of loose and solid rock.

All embankments shall be formed in layers of such thickness as the engineer in charge may prescribe, and be carried up full width, with outside always as high as the middle, care being taken to place material containing the greatest proportion of gravel or stone in the top dressing of the bank. Any injury to the embankments from floods or otherwise before final completion and acceptance of
13 the work by the engineer shall be at the risk of the party of the first part.

Burrow pits must be left in good shape, properly sloped and well drained. Pit-holes, left so water will be liable to accumulate in standing pools, will be filled up or drained at the expense of the party of the first part.

Earth excavation in depot grounds shall be hauled, if so ordered by the ch'f eng'r, and shall be paid for as follows:

Earth excavation, 12¾ cents; haul 1 cent per yard per 100 feet after the first hundred.

For excavation of loose rock and cemented gravel, including, where necessary, a haul of —— feet, thirty-six (36) cents. Loose rock and cemented gravel shall embrace all bowlders and detached masses of rock measuring over one cubic foot and under one cubic yard in bulk and all hard and tough cemented gravel, slate, coal, shale, and soapstone; also stratified lime or sandstone in layers of six (6) inches and under separated by layers of clay or any other material requiring the use of pick and bar or which cannot be plowed with a strong ten-inch grading plow well handled behind a good six (6) mule or horse team.

For the excavation of solid rock, including, where necessary, a haul of ——, eighty (80) cents. Solid rock shall embrace all ledges or masses of limestone, sandstone, or flint in place in masses of more than one (1) cubic yard in bulk.

Excavation under water, per cubic yard, ——.

The contract prices for excavation will apply to pits required for foundations of masonry when water is not encountered. The price put in for excavation in water will only apply to foundation pits and deepening of channels in running water, and shall cover all classes of material and include drainage, bailing, pumping,
14 and all material and labor connected with such excavation; also the necessary dressing of the rock—

It being expressly understood and agreed that there will be no further classifications of excavated material allowed than the three above mentioned; that all earth, rock, loose rock, and cemented

is hereby agreed the party of the second part may do, for other causes than heretofore provided in this contract, then, in that case, all further operations under this contract shall be suspended within thirty days after receiving written notice from the party of the second part requiring the further progress of the work to be suspended, and that party of the first part shall receive full pay for all work done by them, performed under this contract, and at the prices herein stipulated upon the estimate of the said chief engineer, which shall
11 be final and conclusive between the parties to this contract; which estimate shall not include any anticipated profits that might have accrued from the completion of the said work, it being understood that no claim for damages shall be made by the party of the first part on account of any profits that might have accrued from the completion of the same.

The supervision, powers, and control given in this contract to the president and chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas by the parties thereto over the work, labor, and materials to be furnished thereto are conferred in order that the railway being constructed in part under the same may be kept free from laborers, mechanics, and other liens and incumbrances.

The St. L., A. & T. R'y in Texas to furnish free transportation over its line in Texas for men and tools needed in the prosecution of the work under this contract going to the work.

Proposition.

The undersigned propose, under the direction of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, or his assistants or either of them, and under their supervision and control, to do all necessary work and furnish all the required material to complete the graduation and masonry of the Fort Worth Extension of the St. L., A. & T. R'y in Texas between Commerce and Fort Worth, section 1 to 98, both inclusive, as specified below, and in conformity with the specifications and conditions imposed and plans from time to time furnished, binding themselves, should such proposition be accepted, to commence work within ten (10) days thereafter and to prosecute the same with all due diligence, to the end that such contract shall be finished complete in all parts by the first day of November, one thousand eight hundred
12 and eighty-seven, and for such work done and materials furnished the following prices are affixed, and will be accepted by them as full, complete, and entire compensation for the same; and, further, that all measurements, classifications, and calculations made by the said chief engineer or his assistants shall be considered and accepted as correct, full, and final:

For grubbing, to be paid at eighty-five (85) dollars per acre, with the understanding that all trees and stumps shall be grubbed and removed from all excavations for the roadway and from embankments under three (3) feet in height, and that pay for grubbing will be expected only where there are trees and stumps to be grubbed.

For clearing, twenty (20) dollars per acre, with the understanding that whatever designated by the said chief engineer or his assistants the entire surface of the right of way shall be cleared of all trees, logs and brush, or other perishable material, except such logs or trees as may be needed for the construction of said railroad, which shall be left in piles convenient for use.

For excavation of earth, including, if required, an extreme haul of —— feet, twelve and ¾ (12¾) cents.

Earth excavation shall embrace all excavated material not included in the classes of loose and solid rock.

All embankments shall be formed in layers of such thickness as the engineer in charge may prescribe, and be carried up full width, with outside always as high as the middle, care being taken to place material containing the greatest proportion of gravel or stone in the top dressing of the bank. Any injury to the embankments from floods or otherwise before final completion and acceptance of
13 the work by the engineer shall be at the risk of the party of the first part.

Burrow pits must be left in good shape, properly sloped and well drained. Pit-holes, left so water will be liable to accumulate in standing pools, will be filled up or drained at the expense of the party of the first part.

Earth excavation in depot grounds shall be hauled, if so ordered by the ch'f eng'r, and shall be paid for as follows:

Earth excavation, 12¾ cents; haul 1 cent per yard per 100 feet after the first hundred.

For excavation of loose rock and cemented gravel, including, where necessary, a haul of —— feet, thirty-six (36) cents. Loose rock and cemented gravel shall embrace all bowlders and detached masses of rock measuring over one cubic foot and under one cubic yard in bulk and all hard and tough cemented gravel, slate, coal, shale, and soapstone; also stratified lime or sandstone in layers of six (6) inches and under separated by layers of clay or any other material requiring the use of pick and bar or which cannot be plowed with a strong ten-inch grading plow well handled behind a good six (6) mule or horse team.

For the excavation of solid rock, including, where necessary, a haul of ——, eighty (80) cents. Solid rock shall embrace all ledges or masses of limestone, sandstone, or flint in place in masses of more than one (1) cubic yard in bulk.

Excavation under water, per cubic yard, ——.

The contract prices for excavation will apply to pits required for foundations of masonry when water is not encountered. The price put in for excavation in water will only apply to foundation pits and deepening of channels in running water, and shall cover all classes of material and include drainage, bailing, pumping,
14 and all material and labor connected with such excavation; also the necessary dressing of the rock—

It being expressly understood and agreed that there will be no further classifications of excavated material allowed than the three above mentioned; that all earth, rock, loose rock, and cemented

gravel shall be measured in excavation and the price per cubic yard mentioned shall cover the entire charge for excavating, loading, and hauling to deposit in embankment or waste for an extreme limit of —— feet, and that no material shall be wasted except by permission of the chief engineer.

For all haul of material excavated or barrowed in excess of —— feet, per one hundred (100) feet, per cubic yard one (1) cent.

For white, burr or post oak timber, or plank in foundation or box drain, per one thousand (1,000) F., B. M., ——.

For white, burr or post oak timber, or planks in trestles, per thousand (1,000) F., B. M., ——.

For —— pine timber and planks in trestles, per one thousand (1,000) F., B. M., ——.

All lumber shall be free from wind shakes, large knots, decayed wood, sap, or any defect that will impair its strength or durability.

For white or post oak piles, delivered, price to be fixed by engineer, per lineal foot. Piles shall not be less than twelve inches in diameter at the small end and shall be straight, sound, and free from any knots that, in the opinion of the engineer or inspector, may impair their durability and strength, and all piles shall be barked.

For preparing and driving piles per lineal foot, for length actually driven, measured under the cap, ——.

Piles to be driven till they move not more than one-half
15 inch to the blow of a hammer weighing not less than 1,800 pounds, with twenty (20) feet fall.

For wrought-iron spikes and bolts in foundations and trestles or shoes of piles, per pound, ——.

For cast iron in foundations and trestles, —— per pound.

For first-class arch masonry, ——. This shall comprise the arch of all important arches as designated by the chief engineer, and must be first class in every respect. The beds shall be dressed for the entire depth of the arch to an even surface throughout, out of wind, full at the back, and to conform to the radius of the arch.

The joints shall be at right angles to the intrados of the arch, full throughout, and the intrados neatly dressed to fit closely to centering, and no stone shall be less than two and one-half ($2\frac{1}{2}$) feet long. It shall be laid with close joints, with thin hydraulic cement mortar, sufficient merely to equalize the bearing and fill the interstices between the dressed beds, and when being laid each stone shall be thoroughly wet, the whole top of the arch to be plastered over with a good coat of hydraulic mortar. The necessary timber and other material for centering shall be furnished by the contractor without charge, and the centering shall be constructed in such manner and of such proportion as the chief engineer may direct.

For second-class arch masonry, price to be fixed by engineer per cubic yard.

This may, at the discretion of the chief engineer, be adopted for the smaller arches. It shall be built of stone, with good natural
beds of a depth equal to the depth of the arch, and of approved
16 lengths, so as to make a good bond throughout, and be laid

in hydraulic mortar. In the construction of this class of work arches may at times take the form of sewers or whole circles.

For first-class bridge masonry, —— dollars per cubic yard.

This shall comprise masonry in abutments and piers of all important bridges and arches, and dressed coping of second-class masonry as designed by chief engineer.

This shall be laid in regular courses throughout. No course shall be less than ten inches thick nor any course overlie another of less thickness. No stretcher shall be less than two and one-half (2½) feet long nor less than one and one-half (1½) feet bed, and in no case shall the bed be less than one and one-quarter (1¼) times the height of the course. Headers shall be not less than three and one-half (3½) feet long nor less than one and one-half (1½) feet wide, and always at least as wide as high. All stone shall be laid with close joints on their quarry beds, the largest bed down, and the beds and tops shall be dressed to parallel faces throughout their entire extent. The joints shall be vertical or horizontal, and the vertical joints shall break not less than twelve (12) inches. No spalls shall be used to level up.

Vertical joints shall be close, at least eight (8) inches back from the face. Not less than thirty (30) per cent. of the face of the walls shall consist of headers. A pitch draft will be used throughout, except at the angles, where a neat chisel draft one and one-half (1½) inches wide will be cut, and the face shall nowhere project more than three (3) inches beyond the draft.

Coping shall be of dimension stone dressed throughout.

17 The whole must be well bonded, the face laid wet, in good hydraulic mortar, and the back pointed, and each successive course well wet and thoroughly grouted, before the next course is laid, with grout made by hydraulic mortar.

Second-class bridge masonry, —— dollars per cubic yard.

This class of masonry shall be laid with horizontal beds and vertical joints, but the courses need not be continuous. The backing shall consist of broken range, rubble masonry of superior quality and bonded and leveled. At least one-fourth of the area of the face of the wall shall consist of headers. No joint in the face shall be open more than one-half inch at any point and the whole shall be laid in good hydraulic mortar.

Dry second-class bridge masonry, per cubic yard, ——.

This will be of the same character as second-class bridge masonry, except that mortar will not be used, and more care will be necessary to dress the beds so as to secure firm and stable work. The stone shall be large and of approved shape and quality, and all crevices well filled with spalls.

Third-class masonry, per cubic yard, —— dollars.

Shall be built of large stone, having good, natural beds, well bonded and laid in hydraulic mortar, but without being in courses.

Third-class masonry, dry, per cubic yard, ——.

Shall be built of large stone, with good, natural beds, well bonded, but without mortar. As far as practicable the stone shall extend through the walls and the crevices shall be well filled with spalls.

Slope wall and paving, per cubic yard, —— dollars.

Shall compose paving of culverts and bridges and slope
18 walls of embankments whenever required. It shall be closely laid with flat stone placed on edge, of such size as the engineer may direct, and shall be measured when laid and finished.

General.

Whenever hydraulic mortar or grout is used it shall be made of a mixture of clean, sharp sand, two parts, and of good hydraulic cement (subject to the inspection and approval of the chief engineer), one part, mixed and tempered as used. All masonry estimated, measured, and paid for by the cubic yard, computing the actual solid contents thereof. No constructive or conventional measurement will be allowed. The class of masonry to be used in each particular structure or in the several parts of any particular work shall be designated by the chief engineer in each case.

For all haul of rock used in masonry after the first mile, —— per mile per cubic yard.

The quarry to be accepted and approved by the chief engineer.

Proposal and Specifications for Shafts and Tunnels.

For tunnel excavation in solid rock, including an extreme haul of —— feet, —— per cubic yard.

For tunnel excavation in loose rock or other material, except solid rock, including an extreme haul of —— feet, —— per cubic yard.

Tunnels will be excavated for a single track and will contain not less than — (10) cubic yards per lineal foot. The prices for tunnel excavation will include all materials contained between the two portals and within the area of its cross-section, as determined by the engineer. If the tunnel requires support and timber is
19 adopted the area of its cross-section will be six (6) inches outside of the wall or arch. The price bid shall include all temporary supports, such as props, scaffolding, etc., and for all necessary pumping and drainage during the progress of the work. Falls that, in the opinion of the engineer, are attributable to the carelessness or neglect of the contractor shall be removed by the contractor at his own risk, but if not thus attributable a just and equitable allowance will be made.

For permanent timber lining in place, —— per 1,000 ft., B. M. Timber shall be sound white or burr oak and shall be of the dimensions and plan as required by the engineer.

For dry stone packing, —— per cubic yard. The space between the timber lining and the sides and roof of the tunnel shall be packed with hard, durable stone of size and quality approved by the engineer.

For shaft excavation in solid rock, including an extreme haul of —— feet, —— per cubic yard.

For shaft excavation in loose rock or other material, except solid rock, including an extreme haul of —— feet, —— per cubic yard.

The engineer shall determine whether shafts shall be sunk and the points for the location of the same. They shall contain not less than three (3) cubic yards to the foot vertical. The price for shaft excavation shall include all materials and machinery necessary for the proper and efficient drainage and ventilation of the shaft and for hauling the material excavated therefrom.

General.

The work on shafts and tunnels shall be carried on night
20 and day, if so directed by the engineer; and the contractor shall employ persons skilled in such work, and use the best tools and machinery to be obtained for rapid and efficient progress.

In witness whereof the said parties have hereunto set their hands this 3d day of June, A. D. 1887.

(Signed) J. H. BRITTON,
O. T. LYON,
Parties of the First Part.
C. H. SMITH & CO.

EXHIBIT "B" TO PETITION.

This agreement, made and entered into this 1st day of July, one thousand eight hundred and eighty-seven, by and between Britton & Lyon, Sherman, Texas, party of the first part, and C. H. Smith & Co., party of the second part, witnesseth: That, for and in consideration of the payments hereinafter mentioned to be made by the said party of the second part, the party of the first part hereby covenants and agrees and binds their heirs, executors, administrators, and assigns, strictly in accordance with the terms of this agreement and the proposition of the party of the first part, herein incorporated and forming a part of this agreement, and under the direction of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas and under his supervision and control, to furnish the materials and do the work opposite which prices are affixed pertaining to the pile and frame trestle and cattle-guards of the Fort Worth Extension of St. L., A. & T. R'y in Texas, between Commerce and Fort Worth, and such work as may be properly connected therewith or incident thereto, and complete the same
21 in all its parts on or before November 1st, 1887.

The time of completion of the same being an essential part of the contract, and it being expressly understood and agreed as follows: That all measurements made by the said chief engineer or his assistants shall be considered and accepted as correct, full, and final. That the prices affixed shall be accepted as full consideration for labor performed and materials furnished. That no extra charges will be claimed or allowed on account of changes either in line or grade of the road. That if any damage shall be done by the parties of the first part or persons in their employ to the owner or

occupant of land or other property adjoining or in the vicinity of the work herein contracted to be done, the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas shall have the right to estimate the amount of said damage, and to pay the same to said owner or occupant, and the amount so paid for such damage shall be deducted from the value of the work done under this contract. That all roads for hauling materials and ways to and from the work, also all grounds for the deposit of materials and the erection of shanties or yards for the performance of the work, not within the limits of the right of way of the railroad, shall be provided for by the parties of the first part at their own proper charge and expense.

Whenever the route of the railroad is traversed by public or private roads commodious passing places must be kept open and in safe condition for use; and in passing through farms the parties of the first part must also keep up such temporary fences as will be necessary for the preservation of crops.

On or about the first day of each month, during the progress
22 of the work, an estimate shall be made of the relative value of the work done and material furnished, to be judged of by the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, and, upon his certificate of the amount being presented to the party of the second part or such disbursing agent as he may appoint, eighty-five per cent. of the amount of said estimate shall be paid to said parties of the first part at St. Louis: Provided, however, that the said parties of the first part shall furnish the party of the second part or his agent, on or about the tenth day of each month, a sworn statement of the amount owed by him for labor, materials, and supplies up to the end of the month preceding such statement; and when all the work embraced in this contract is completed agreeably to the specifications and in accordance with the directions and to the satisfaction and acceptance of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, there shall be a final estimate of the quantity, quality, character, and value of said work agreeably to the terms of this agreement, when the balance appearing due to said parties of the first part shall be paid to them upon their giving a release under seal to the said party of the second part and a sworn statement that all obligations due for labor and materials have been paid, monthly estimates to be paid on or about the twentieth (20th) day of each month. It is agreed that all materials used in the construction of the work under this contract and all the work done under it shall be subject to the inspection and approval of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas and all materials condemned by him shall be removed to such distance as said engineer shall deem necessary in order to prevent the same from being used in said work, and all condemned work shall
23 be taken down and rebuilt, or the chief engineer may, at his option, permit it to remain and make such deduction from the contract price herein agreed upon as he, the said chief engineer,

considers just and proper on account of its not being constructed in accordance with the requirements of this contract.

It is further understood that none but competent foremen, mechanics, and workmen shall be employed upon said work, and any person or persons whom the party of the second part or the president or chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas considers to be incompetent or disorderly or disposed to make mischief or difficulty shall be immediately discharged by the party of the first part and shall not afterwards be employed upon said work without the consent, in writing, of the party of the second part or the president or the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas.

No part of the work to be performed under this contract shall be sublet without the consent of the party of the second part or the president or chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas given in writing, and no such written consent shall release the parties of the first part from any obligations either to the party of the second part or the persons employed by such subcontractor; and in all such cases the subcontractors will be considered merely in the light of foremen employed by the parties of the first part, and liable to be discharged by the party of the second part or by the president or chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas for incompetency, neglect of duty, or misconduct, and the parties of the first part shall see that all persons employed by any subcontractor are
24 regularly and promptly paid the same as if they were employed directly by the party of the first part.

It is also agreed that the party of the second part or the St. Louis, Arkansas and Texas Railway Company in Texas may, whenever he or it deem it proper and expedient so to do, pay to the laborers or other persons employed by said parties of the first part, and of any moneys due for any monthly and other estimate, any sums due to them for labor or service performed for said parties of the first part under this contract, and the sums so paid shall be charged to the parties of the first part as so much money paid to them on this contract.

To insure prompt and speedy action and save the party of the second part from loss from any cause whatsoever the party of the second part reserves the right to order and direct the work to be prosecuted at such points as the chief engineer may designate, and to order such force worked at such points as he may deem necessary to complete the work to be done under this contract in the shortest possible time; and should the parties of the first part fail to comply with said order by neglecting or refusing to employ such force as the party of the second part or the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas shall direct or fail at any time or in anywise to prosecute the work in such a manner as in the opinion of the said chief engineer to give reasonable assurance of the completion of the whole or any part of the work within the time limited in this contract, or should the party of the first part persist in doing any of said work in an im-

proper manner or in employing improper persons or in neglecting or evading the performance of their obligations under this contract in any way, then the party of the second part or the chief
25 engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, after giving three days' written notice to the person in charge without the evil complained of being corrected to their entire satisfaction, may declare this contract forfeited, and in such case all the rights of the party of the first part under this contract shall from thenceforth cease and be determined; that the party of the second part may thereupon proceed to take possession of and relet the work comprised herein to other parties the same as if this contract had never existed; and in case this contract is declared forfeited, as herein provided, the fifteen per cent. retained by the party of the second part from the monthly estimates shall be forfeited absolutely to said party of the second part and the parties of the first part shall have no claim whatever to the same; and the parties of the first part agree to give peaceable and immediate possession of all said work to the party of the second part or his authorized agents.

The parties to this contract hereby mutually agree that the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas shall be the sole judge and arbiter in all cases of disagreement, difficulty, or dispute as to the quality or amount of work performed under this contract, and also in relation to all matters of difference that may arise between the parties hereto in relation to or touching the proper performance of any or all the conditions thereof, and his decision, given in writing, shall be in the nature of an award, and the same shall be as conclusive upon and between the parties hereto as a final judgment in a court of competent jurisdiction, and no appeal shall be taken or suit instituted or prosecuted in any court to set aside or contest the same or to read-
26 just or question the validity or correctness of any matter upon which he has passed.

Whenever all the work required under this contract or any continuous five miles shall be fully completed to the satisfaction and acceptance of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas said party of the second part accept the same, said engineer giving said first parties a certificate of his acceptance.

In case any or all the work embraced in this contract shall be suspended by and on account of the party of the second part, which it is hereby agreed the party of the second part may do, for other causes than heretofore provided in this contract, then in that case all further operations under this contract shall be suspended within thirty days after receiving written notice from the party of the second part requiring the further progress of the work to be suspended; and the parties of the first part shall receive full pay for all work done by them performed under this contract and at the prices herein stipulated upon the estimate of the said chief engineer, which shall be final and conclusive between the parties to this contract, which estimate shall not include any anticipated profits that might

have accrued from the completion of the said work, it being understood that no claim for damages shall be made by the parties of the first part on account of any profits that might have accrued from the completion of the same.

The supervision, powers, and control given in this contract to the president and chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas by the parties thereto over the work, labor, and materials to be furnished thereto are conferred in order that the railway, being constructed in part under the same, may
27 be kept free from laborers', mechanics', and other liens and encumbrances.

Proposition.

The undersigned propose, under the direction of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, or his assistants or either of them, and under their supervision and control, to do all necessary work and furnish all the required material to complete the pile and frame trestle & cattle-guards of Fort Worth Extension of St. L., A. & T. R'y in Texas, as specified below, and in conformity with the specifications and conditions imposed and plans from time to time furnished, binding themselves, should such proposition be accepted, to commence work within ten (10) days thereafter, and to prosecute the same with all due diligence, to the end that such contract shall be finished complete in all parts by the 1st day of November, one thousand eight hundred and eighty-seven, and for such work done and materials furnished the following prices are affixed, and will be accepted by them as full, complete, and entire compensation for the same; and, further, that all measurements, classifications, and calculations made by the said chief engineer or his assistants shall be considered and accepted as correct, full, and final:

For grubbing, to be paid at —— dollars per acre, with the understanding that all trees and stumps shall be grubbed and removed from all excavations for the roadway and from embankments under three (3) feet in height, and that pay for grubbing will be expected only where there are trees and stumps to be grubbed.

For clearing, —— dollars per acre, with the understanding that wherever designated by the said chief engineer or his assist-
28 ants the entire suface of the right of way shall be cleared of all trees, logs, and brush, or other perishable material, except such logs or trees as may be needed for the construction of said railroad, which shall be left in piles convenient for use.

For excavation of earth, including, if required, an extreme haul of —— feet, ——.

Earth excavation shall embrace all excavated material not included in the classes of loose and solid rock.

All embankments shall be formed in layers of such thickness as the engineer in charge may prescribe and be carried up full width, with outside always as high as the middle, care being taken to place material containing the greatest proportion of gravel or stone in the

top dressing of the bank. Any injury to the embankments from floods or otherwise, before final completion and acceptance of the work by the engineer, shall be at the risk of the parties of the first part.

Borrow pits must be left in good shape, properly sloped, and well drained. Pit-holes left so water will be liable to accumulate in standing pools, will be filled up or drained at the expense of the party of the first part.

For excavation of loose rock and cemented gravel, including, where necessary, a haul of —— feet, ——. Loose rock and cemented gravel shall embrace all bowlders and detached masses of rock measuring over one cubic foot and under one cubic yard in bulk, and all hard and tough cemented gravel, slate, coal, shale, and soapstone; also stratified lime or sandstone in layers of six (6) inches and under, separated by layers of clay, or any other material requiring the use of pick and bar or which cannot be plowed with a strong ten-inch grading plow well handled behind a good six (6) mule or horse team.

29 For the excavation of solid rock, including, where necessary, a haul of ——. Solid rock shall embrace all ledges or masses of limestone, sandstone, or flint in place in masses of more than one (1) cubic yard in bulk.

Excavation in foundation, 35c. per cu. yd.

The contract prices for excavation will apply to pits required for foundations of masonry when water is not encountered. The price put in for excavation in water will only apply to foundation pits and deepening of channels in running water and shall cover all classes of material and include drainage, bailing, pumping, and all material and labor connected with such excavation, also the necessary dressing of the rock.

It being expressly understood and agreed that there will be no further classifications of excavated material allowed than the three above mentioned; that all earth, rock, loose rock, and cemented gravel shall be measured in excavation and the price per cubic yard mentioned shall cover the entire charge for excavating, loading, and hauling to deposit in embankment or waste for an extreme limit of —— feet, and that no material shall be wasted, except by permission of the chief engineer.

For all haul of material excavated or barrowed in excess of —— feet, per one hundred (100) feet per cubic yard, one (1) cent.

For white, burr, or post oak timber or plank in foundation or box drain, per one thousand (1,000) F., B. M., ——.

For white, burr, or post oak timber or planks in trestles, per thousand (1,000) F., B. M., thirty dollars ($30.00) per M.

For long-leaf yellow pine timber and planks in trestles & cattle-guards, per one thousand (1,000) F., B. M., thirty dollars
30 ($30.00) per M.

All lumber shall be free from wind shakes, large knots, decayed wood, sap, or any defect that will impair its strength or durability.

Piles shall not be less than ten inches in diameter at the small

end and shall be straight, sound, and free from any knots that, in the opinion of the engineer or inspector, may impair their durability and strength, and all piles shall be barked.

For preparing and driving piles, per lineal foot, for length actually driven, measured under the cap, not exceeding 20 ft. in length, forty-six cents per lineal foot.

Piles to be driven till they move not more than one-half inch to the blow of a hammer weighing not less than 1,800 pounds, with twenty (20) feet fall.

For wrought-iron spikes and bolts in foundations and trestles or shoes of piles, per pound, six cents (6c.).

For cast iron in foundations and trestles, six cents (6c.) per pound.

For first-class arch masonry, ——. This shall comprise the arch of all important arches as designated by the chief engineer, and must be first class in every respect. The beds shall be dressed for the entire depth of the arch to an even surface throughout, out of wind, full at the back, and to conform to the radius of the arch.

The joints shall be at right angles to the intrados of the arch, full throughout, and the intrados neatly dressed to fit closely to centering, and no stone shall be less than two and one-half ($2\frac{1}{2}$) feet long.

It shall be laid with close joints, with thin hydraulic cement
31 mortar sufficient merely to equalize the bearing and fill the interstices between the dressed beds, and when being laid each stone shall be thoroughly wet. The whole top of the arch to be plastered over with a good coat of hydraulic mortar. The necessary timber and other material for centering shall be furnished by the contractor without charge, and the centering shall be constructed in such manner and of such proportions as the chief engineer may direct.

For second-class arch masonry, price to be fixed by engineer per cubic yard.

This may, at the discretion of the chief engineer, be adopted for the smaller arches. It shall be built of stone, with good natural beds of a depth equal to the depth of the arch and of approved lengths so as to make a good bond throughout, and be laid in hydraulic mortar. In the construction of this class of work arches may at times take the form of sewers or whole circles.

For first-class bridge masonry, —— dollars per cubic yard.

This shall comprise masonry in abutments and piers of all important bridges and arches and dressed coping of second-class masonry as designed by chief engineer.

This shall be laid in regular courses throughout. No course shall be less than ten inches thick nor any course overlie another of less thickness. No stretcher shall be less than two and one-half ($2\frac{1}{2}$) feet long nor less than one and one-half ($1\frac{1}{2}$) feet bed, and in no case shall the bed be less than one and one-quarter ($1\frac{1}{4}$) times the height of the course. Headers shall be not less than three and one-half ($3\frac{1}{2}$) feet long nor less than one and one-half ($1\frac{1}{2}$) feet wide, and always at least as wide as high. All stone shall be paid with
32 close joints on their quarry beds, the largest beds down, and the beds and tops shall be dressed to parallel faces throughout

their entire extent. The joints shall be vertical or horizontal and the vertical joints shall break not less than twelve (12) inches. No spalls shall be used to level up. Vertical joints shall be close, at least eight (8) inches back from the face; not less than thirty (30) per cent. of the face of the walls shall consist of headers. A pitch draft will be used throughout except at the angles, where a neat chisel draft one and one-half (1½) inches wide will be cut and the face shall nowhere project more than three (3) inches beyond the draft.

Coping shall be of dimension stone, dressed throughout. The whole must be well bonded, the face laid wet, in good hydraulic mortar, and the back pointed, and each successive course well wet and thoroughly grouted, before the next course is laid, with grout made by hydraulic mortar.

Second-class bridge masonry, —— dollars per cubic yard.

This class of masonry shall be laid with horizontal beds and vertical joints, but the courses need not be continuous. The backing shall consist of broken range, rubble masonry of superior quality and bonded and leveled. At least one-fourth of the area of the face of the wall shall consist of headers. No joint in the face shall be open more than one-half inch at any point, and the whole shall be laid in good hydraulic mortar.

Dry second-class bridge masonry, per cubic yard, ——.

This will be of the same character as second-class bridge masonry, except that mortar will not be used and more care will be necessary to dress the beds so as to secure firm and stable work. The
33 stone shall be large and of approved shape and quality, and all crevices well filled with spalls.

Third-class masonry, per cubic yard, —— dollar.

Shall be built of large stone, having good, natural beds, well bonded, and laid in hydraulic mortar, but without being in courses.

Third-class masonry, dry, per cubic yard, ——.

Shall be built of large stone with good, natural beds, well bonded, but without mortar. As far as practicable the stone shall extend through the walls and the crevices shall be well filled with spalls.

Slope wall and paving, per cubic yard, —— dollars.

Shall compose paving of culverts and bridges and slope walls of embankments whenever required. It shall be closely laid with flat stone placed on edge, of such size as the engineer may direct, and shall be measured when laid and finished.

General.

Whenever hydraulic mortar or grout is used it shall be made of a mixture of clean, sharp sand, two parts, and of good hydraulic cement (subject to the inspection and approval of the chief engineer), one part, mixed and tempered as used. All masonry estimated, measured, and paid for by the cubic yard, computing the actual solid contents thereof. No constructive or conventional measurement will be allowed. The class of masonry to be used in each particular structure or in the several parts of any particular work shall be designated by the chief engineer in each case.

For all haul of rock used in masonry after the first mile, —— per mile per cubic yard.

The quarry to be accepted and approved by the chief engineer.

34 *Proposal and Specifications for Shafts and Tunnels.*

For tunnel excavation in solid rock, including an extreme haul of —— feet, —— per cubic yard.

For tunnel excavation in loose rock or other material except solid rock, including an extreme haul of —— feet, —— per cubic yard.

Tunnels will be excavated for a single track and will contain not less than (10) cubic yards per lineal foot. The prices for tunnel excavation will include all materials contained between the two portals and within the area of its cross-section, as determined by the engineer. If the tunnel requires support and timber is adopted, the area of its cross-section will be six (6) inches outside of the wall or arch. The price bid shall include all temporary supports, such as props, scaffolding, etc., and for all necessary pumping and drainage during the progress of the work. Falls that in the opinion of the engineer are attributable to the carelessness or neglect of the contractor shall be removed by the contractor at his own cost, but if not thus attributable a just and equitable allowance will be made.

For permanent timber lining in place, —— per 1,000 ft., B. M. Timber shall be sound white or burr oak, and shall be of the dimensions and plan as required by the engineer.

For dry stone packing, —— per cubic yard. The space between the timber lining and the sides and roof of the tunnel shall be packed with hard, durable stone of size and quality approved by the engineer.

For shaft excavation in solid rock, including an extreme
35 haul of —— feet, —— per cubic yard.

For shaft excavation in loose rock or other material except solid rock, including an extreme haul of —— feet —— per cubic yard.

The engineer shall determine whether shafts shall be sunk, and the points for the location of the same. They shall contain not less than three (3) cubic yards to the foot vertical. The price for shaft excavation shall include all materials and machinery necessary for the proper and efficient drainage and ventilation of the shaft and for hauling the material excavated therefrom.

General.

The work on shafts and tunnels shall be carried on night and day if so directed by the engineer, and the contractor shall employ persons skilled in such work and use the best tools and machinery to be obtained for rapid and efficient progress.

The company agrees to furnish free transportation for men and tools over its lines in Texas.

In witness whereof the said parties have hereunto set their hands this first day of July, A. D. 1887.

(Signed) BRITTON & LYON,
Parties of the First Part.
C. H. SMITH & CO.

Upon the filing of said petition there was issued out of the clerk's office of said court a summons, which, with the marshal's return of service endorsed thereon, is in words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

36 In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon O. T. Lyon, a citizen of the State of Texas, that he be and appear before the honorable circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri on the first day of the next term thereof, to be holden at the city of St. Louis, in and for the eastern division of said district, on the third Monday of March next, then and there to answer the complaint of C. H. Smith, a citizen of the State of Missouri, and Benjamin Fordyce, a citizen of the State of Arkansas, as set forth in the petition filed in said court on the fifteenth day of September, A. D. eighteen hundred and eighty-eight.

Hereof fail not and have you then and there this writ.

Witness the Honorable Samuel F. Miller, presiding associate justice of the Supreme Court of the United States, the 15th day of September, A. D. eighteen hundred and eighty-eight.

[SEAL.] Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

A. P. SELBY, *Clerk,*
By —— ——, *Deputy.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

37 *Marshal's Return.*

I hereby certify that I have executed this writ on the 15th day of September, A. D. 1888, by delivering a certified copy thereof to the within-named defendant, O. T. Lyon, at the city of St. Louis, in the above-named district.

JOHN W. EMERSON,
U. S. Marshal, Eastern District of Missouri,
By WALTER ATKINSON, *Deputy.*

Marshal's fees:

1 service at $2.00	$2 00
Mileage, 1 mile at 6 cents	06
Total	$2 06

38 And afterwards, to wit, on the sixth day of March, A. D. 1889, there was filed in said cause an amended petition in words and figures following, to wit:

Amended Petition.

In the District Court of the United States for the Eastern District of Missouri. March Term, 1889.

C. H. SMITH and BENJAMIN FORDYCE, Plaintiffs,
vs.
O. T. LYON, Defendant.

At this time come the plaintiffs herein and, for their cause of action against the defendant and for amended petition herein filed by leave of the court, state that they are partners doing business under the firm name of C. H. Smith and Company; that said C. H. Smith is a resident and citizen of St. Louis, in the State of Missouri, and the said Benjamin Fordyce is a resident and citizen of Hot Springs, in the State of Arkansas; that the defendant, O. T. Lyon, is a resident and citizen of Sherman, State of Texas. Plaintiffs further state that heretofore, to wit, on the first day of June, 1887, the said plaintiffs and the said defendant, together with one James H. Britton, under the firm name of Britton and Lyon, entered into an agreement and contract, whereby the said Britton and Lyon agreed to furnish all the requisite materials and do all the necessary work for the completion in all its parts of the graduation and masonry of a railroad commencing at Commerce, in the county of Hunt, State of Texas; thence running in a southwesterly direction through the counties of Hunt, Collin, Dallas, and Tarrant to the city of Ft. Worth, in Tarrant county, Texas, and to do and perform all the work properly connected therewith and incident thereto; and said work was to be done and materials furnished under the supervision and control of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas; and the same was to
39 be completed in all its parts on or before the first day of November, 1887. Plaintiffs allege that said Britton and Lyon were to receive pay for the work of graduation of said line and furnishing materials therefor as follows:

For grubbing right of way, $85.00 per acre.

For clearing right of way, $20.00 per acre.

Earth-work in embankments or excavation, 12½c. per cubic yard, and 1c. per cubic yard for hauling the same when hauled over 100 feet.

Loose rock excavated, 36c. per yard.

Solid rock excavated, 80c. per yard.

Plaintiffs allege that said Britton and Lyon by their contract aforesaid agreed to pay for all damages done by them or by persons in their employ to the owners or occupants of land or other property in the vicinity where the work was contracted to be done or have the same paid by these plaintiffs, and such sums paid out to be deducted from the value of the work done under said contract. Plaintiffs allege that said Britton and Lyon by their contract aforesaid agreed to make and keep commodious passing places open and in safe condition for use on all public or private roads crossed by said railroad agreed to be constructed and to keep up temporary fences, such as would be necessary for the preservation of the crops, where the said railroad passed through farms. Plaintiffs say that defendants did not keep and perform this condition of the contract, and that damages did accrue and were done by said Britton and Lyon and by persons in their employ to the owners and occupants of land and other property adjoining and in the vicinity of the work contracted to be done, and damages accrued to crops by reason of their failure to keep up proper and necessary fences to protect said crops on farms which said railway agreed to be constructed passed through, and that the amount of said damages was $15,000.00, and that said Britton and Lyon failed and refused and neglected to pay the same, although plaintiffs re-
40 quested them so to do, and that these plaintiffs were thereupon compelled to and did pay said damages to the damage and injury of said plaintiffs in the sum of $15,000.00. Plaintiffs allege that said Britton and Lyon, by the terms of the said contract, were to perform all the work aforesaid and furnish all the materials aforesaid and do the work connected therewith and incident thereto as aforesaid and complete the same in all its parts to the satisfaction and acceptance of the chief engineer of the St. Louis, Arkansas & Texas Railway Company in Texas, and to do such work and to furnish the materials where directed so to do by the chief engineer of the St. Louis, Arkansas & Texas Railway Company in Texas, and to pay for all the material necessary to complete the work herein described. Plaintiffs allege that said work, by the terms of said contract, was to be done and the necessary materials furnished and paid for by said Britton and Lyon, and all work incident thereto and connected therewith was to be completed in all its parts on or before the first day of November, 1887, under the direction, supervision, and control of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas and to his satisfaction and acceptance; all of which more fully appears by the contract, which is filed under the original petition herein, marked Exhibit "A," and here referred to and made a part hereof. These plaintiffs allege that they have been at all times ready and willing to pay the said Britton and Lyon for furnishing materials and doing all the work set forth in said contract and herein, according to the terms of said contract, and plaintiffs have kept and performed on their part all the conditions and stipulations thereof. Plaintiffs allege that by the terms of said contract the said Britton and Lyon were to
41 enter upon and commence said work within ten days after

the date of said contract. The plaintiffs further allege that, according to the terms of said contract, Britton and Lyon entered upon and commenced the construction of said work and the furnishing material therefor as they contracted to do, and did a part thereof, but wholly failed, neglected, and refused to complete said work and the furnishing said material required by said contract acebrding to the terms thereof. These plaintiffs allege that they have paid said Britton and Lyon for all said work done and materials furnished by said Britton and Lyon according to said contract and for everything done in connection therewith. Plaintiffs allege that on -- day of ——, 188–, after the making of said contract and after part performance of same as aforesaid, said defendant or said Britton and Lyon agreed and consented that these plaintiffs should by themselves, their agents or employees, or chief engineer of the St. Louis, Arkansas & Texas Railway Company in Texas take charge of said work, complete the same, furnish all materials therefor, and pay for the same, and the payments made therefor and all expenses incurred in so doing should be charged to the said Britton and Lyon and they would pay the same. Plaintiffs allege that they did take charge of said work, complete the same, furnish materials therefor, and that they paid for the same the sum of $45,000.00 more than plaintiffs would have had to pay had Britton and Lyon completed the same according to their said contract, and the said Britton and Lyon and this defendant, although often requested so to do, have wholly neglected and refused to pay said sum or any part thereof to plaintiffs. Plaintiffs allege that they have paid out and expended for work and labor done and performed and materials furnished for the completion of the work which said Britton and
42 Lyon contracted to do as aforesaid and before said Britton and Lyon consented for plaintiffs to complete said work the sum of $15,000.00 more than the contract price at which Britton and Lyon agreed to do the same, and paid out such sum at instance and request of said Britton and Lyon and to protect said property from all liens in favor of parties who performed said work and furnished said materials. Plaintiffs allege that heretofore, to wit, since the making of said contract, said James H. Britton departed this life, and the defendant, O. T. Lyon, herein is the surviving partner of said firm of Britton and Lyon. Wherefore said plaintiffs pray judgment for the sum of $75,000.00 and all their costs.

Second Count.

And for a further and second cause of action plaintiffs allege that heretofore, to wit, on the first day of July, 1887, they entered into a contract and agreement in writing with the defendant, O. T. Lyon, and one James H. Britton, under the firm name of Britton and Lyon, whereby said Britton and Lyon agreed and contracted to do all the necessary work and furnish all the material required, under the supervision and control of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, to complete the pile and frame trestle-work and cattle-guards on said line of railway

between Commerce and Ft. Worth, in the State of Texas, as aforesaid herein, and said Britton and Lyon agreed and undertook to do said work and furnish said materials, and these plaintiffs agreed to pay them therefor as follows, to wit:

For excavation per cubic yard in foundation, 35c. per yard.

For white, burr, or post oak timber or planks in trestles, per thousand feet, board measure, $30.00 per thousand.

For long-leaf yellow pine timber and planks in trestles and cattle-guards, per thousand feet, board measure, $30.00 per thousand.

43 For preparing and driving piles, per lineal foot for the length actually driven, measured under cap, not exceeding 40 feet in length, 46c. per lineal foot.

For wrought-iron spikes and bolts in foundations and trestles, or shoes for piles, 6c. per pound.

For cast iron in foundations and trestles, 6c. per pound.

Plaintiffs allege that said Britton and Lyon, by their contract aforesaid, agreed to pay for all damages done by them or by persons in their employ to the owner or occupant of land or other property in the vicinity where the work was contracted to be done or have the same paid by these plaintiffs, and such sums paid out to be deducted from the value of this work done under said contract. Plaintiffs allege that said Britton and Lyon, by their contract aforesaid, agreed to make and keep commodious passing places open and in safe condition for use on all public or private roads crossed by said railroad agreed to be constructed, and to keep up temporary fences such as would be required and necessary for the preservation of the crops where the said railroads passed through farms. Plaintiffs allege that said Britton and Lyon did not keep and perform these conditions of the contract and that damages did accrue and were done by said Britton and Lyon and by persons in their employ to the owners and occupants of land and other property adjoining and in the vicinity of the work contracted to be done, and damages accrued to crops by reason of their said failure to keep up proper and necessary fences to protect said crops on farms which said railway passed through, and that the amount of said damages was $15,000.00, and that said Britton and Lyon failed and neglected and refused to pay the same, although plaintiffs requested them so to do, and that these plaintiffs were thereupon compelled to and did pay said damages to the damage and injury of said plaintiffs in the sum of $15,000.00. Plaintiffs allege that said Britton and Lyon, by the terms of said contract, were to perform all the work aforesaid and furnish all

44 the materials aforesaid and do the work incident thereto as aforesaid and complete the same in all its parts to the satisfaction and acceptance of the chief engineer of the St. Louis, Arkansas & Texas Railway Company in Texas, and to do such work and to furnish materials where directed so to do by the chief engineer of the St. Louis, Arkansas & Texas Railway Company in Texas, and to pay for all the material necessary to complete the work herein described. Plaintiffs allege that said work by the terms of said contract was to be done and the necessary material furnished and paid for by said defendant and all work incident thereto and connected

therewith was to be completed in all its parts on or before the first day of November, 1887, under the direction, supervision, and control of the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, and to his satisfaction and acceptance; all of which more fully appears by the original contract which is filed with the original petition herein, marked Exhibit "B," and here referred to and made a part hereof. These plaintiffs allege that they have been at all times ready and willing to pay the said Britton and Lyon for furnishing materials and doing all the work set forth in said contract and herein, according to the terms of said contract, and plaintiffs have kept and performed on their part all the conditions and stipulations thereof. Plaintiffs allege that by the terms of said contract the said Britton and Lyon were to enter and commence said work within ten days after the date of said contract. The plaintiffs further allege that according to the terms of said contract said Britton and Lyon entered upon and commenced the construction of said work and the furnishing material therefor as they
45 contracted to do and did a part thereof, and have wholly failed, neglected, and refused to complete said work and the furnishing of said material required by said contract, and, although they have been requested so to do by the plaintiffs, have failed, neglected, and refused to complete said work. These plaintiffs allege that they have paid said Britton and Lyon for all said work done and materials furnished according to said contract and for everything done in connection therewith. Plaintiffs allege that on the — day of ——, 188–, after the making of said contract and after part performance of same as aforesaid, said defendant or said Britton and Lyon agreed and consented that these plaintiffs should by themselves, their agents or employees, or the chief engineer of the St. Louis, Arkansas and Texas Railway Company in Texas, take charge of said work, complete the same, furnish all materials therefor, and pay for the same, and the payment made therefor and all expenses incurred in so doing should be charged to said Britton and Lyon and they would pay the same. Plaintiffs allege they did take charge of said work, complete the same, furnish materials therefor, and paid for the same the sum of $25,000.00 more than plaintiffs would have had to pay had Britton and Lyon completed the same according to their said contract; and the said Britton and Lyon and this defendant, although often requested so to do, have wholly neglected and refused to pay said sum or any part thereof to plaintiffs. Plaintiffs allege that they have paid out and expended for work and labor done and performed and materials furnished for the completion of the work which said Britton and Lyon contracted to do as aforesaid and before said Britton and Lyon consented for plaintiffs to complete said work the sum of $15,000.00 more than the contract price at which Britton and Lyon agreed to do
46 the same, and paid out such sum at instance and request of said Britton and Lyon and to protect said property from all liens in favor of parties who performed said work and furnished said materials. Plaintiffs allege that heretofore, to wit, since the making of said contract, said James H. Britton departed this life,

and the defendant, O. T. Lyon, herein is the surviving partner of said firm of Britton and Lyon.

Wherefore said plaintiffs pray judgment for the sum of $55,000.00 and all costs. Wherefore plaintiffs pray, the premises considered they have judgment against said defendant, O. T. Lyon, for the sum of $130,000.00 and all costs and all proper relief.

JEFFERSON CHANDLER,
PHILLIPS & STEWART,
SAM. H. WEST,
R. H. LANDALE,
Pl'ffs' Att'ys.

And afterwards, to wit, on the nineteenth day of March, A. D. 1889, there was filed in said cause a motion to dismiss suit for want of jurisdiction in words and figures following, to wit:

Motion to Dismiss.

In the Circuit Court of the United States for the Eastern Div. of Eastern District of Missouri. March Term, A. D. 1889.

C. H. SMITH and BENJAMIN FORDYCE, Pl'ffs,
vs.
O. T. LYON, Def't.

And now comes said defendant, O. T. Lyon, and, specially appearing in this above-entitled cause for the purposes of this motion only and objecting to the jurisdiction of this court over him herein, shows to the court that it appears upon the face of said plaintiffs'
47 petition and amended petition of record herein that one of said plaintiffs, to wit, Benjamin Fordyce, is and was at the time of the institution of this suit a resident and citizen of Hot Springs, in the State of Arkansas, and this defendant a resident and citizen of Sherman, in the State of Texas, and that this suit is not brought in the district of the residence of either said plaintiff, Benjamin Fordyce, or this defendant, and that the same is unlawfully brought against said defendant in this the eastern district of Missouri, and defendant objects and excepts to the jurisdiction of this court over him in this cause, and says that it is without jurisdiction to hear and determine the matters whereof plaintiffs have in their petition and amended petition herein complained, as by their said petitions of record herein appears. Wherefore defendant now moves the court that this suit abate and that the same be now dismissed.

R. C. FOSTER &
A. E. WILKINSON,
Att'ys for Defendant.

And afterwards, to wit, on the twentieth day of March, A. D. 1889, the following, among other, proceedings were had and appear of record in said cause, to wit:

C. H. SMITH *et al.*, Plaintiffs,
vs.
O. T. LYON, Defendant. } 2987.

Now come the parties, by their attorneys, and the defendants' motion to dismiss this cause for want of jurisdiction is argued by counsel and submitted and by the court taken under advisement.

48 And afterwards, to wit, on the twenty-first day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

Motion to Dismiss Sustained.

C. H. SMITH *et al.*, Plaintiffs,
vs.
O. T. LYON, Defendant. } 2987.

Now come the parties, by their attorneys, and the court, having considered the defendant's motion to dismiss this cause for want of jurisdiction, orders that said motion be sustained, and that this cause be, and the same is hereby, dismissed at plaintiffs' costs.

To which ruling of the court the plaintiffs then and there duly excepted.

And afterwards, to wit, on the twenty-third day of March, A. D. 1889, there was filed in said cause a motion for rehearing on motion to dismiss for want of jurisdiction in words and figures following, to wit:

Motion for Rehearing.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

C. H. SMITH *et al.*
vs.
O. T. LYON. } Motion for Rehearing on Motion to Dismiss for Want of Jurisdiction.

Now comes the plaintiff and moves the court to set aside the order made herein dismissing this cause for want of jurisdiction and to grant the plaintiff a rehearing in the trial of said cause, and for reasons why the same should be done the plaintiff shows to the court as follows:

49 1st. That the action of the court in dismissing was erroneous and contrary to the law and the statute in such cases made and provided.

2nd. That it appears from the records in this cause that the plaintiff is a copartnership doing business, residing in, and a citizen of the State of Missouri, within this district, and as such should be permitted to maintain and prosecute its said suit against the defendant, who is a resident and citizen of a different State and district, who was found and duly served with process in this district.

3rd. That the cause of action sued upon in this cause is transitory

in its nature and might be sued upon anywhere that service could be had upon defendant.

JEFFERSON CHANDLER,
R. H. LANDALE,
S. H. WEST, *Att'ys for Pl'ff.*

And afterwards, to wit, on the twenty-second day of April, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

Motion for Rehearing Denied.

C. H. SMITH *et al.*, Plaintiff,
vs.
O. T. LYON, Defendant. } 2987.

Now come the parties, by their attorneys, and the court, having considered the petition of plaintiffs for a rehearing on the motion to dismiss for want of jurisdiction herein, orders that said petition be, and the same is hereby, overruled.

And afterwards, to wit, on the ninth day of May, A. D.
50 1889, the following further proceedings were had and appear of record in said cause, to wit:

Writ of Error Allowed.

C. H. SMITH *et al.*, Plaintiffs,
vs.
O. T. LYON, Defendant. } 2987.

Now come the plaintiffs, by attorney, and present to the court their bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein. Said plaintiffs also present to the court a writ of error to remove this cause to the Supreme Court of the United States; and a citation, citing and admonishing the said defendant to be and appear at a Supreme Court of the United States to be begun and holden at Washington, D. C., on the second Monday of October next, on the first day of said term, which said writ of error is allowed and said citation signed by the judge. Said plaintiffs also present to the court their bond, in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

Said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

C. H. SMITH and BENJAMIN FORDYCE, Plaintiffs,
vs.
O. T. LYON, Defendant. }

Be it known that on the 19th day of March, 1889, the following proceeding in the above-entitled cause were had:

Defendant filed in court a motion to dismiss plaintiffs' petition

for the reason alleged by defendant that the court had no jurisdiction to entertain the same, which in words and figures is as
51 follows, to wit:

In the Circuit Court of the United States for the Eastern Div. of Eastern District of Missouri. March Term, A. D. 1889.

C. H. SMITH and BENJAMIN FORDYCE, Pl'ffs,
vs.
O. T. LYON, Def't.

And now comes said defendant, O. T. Lyon, and, specially appearing in this above-entitled cause for the purposes of this motion only and objecting to the jurisdiction of this court over him herein, shows to the court that it appears upon the face of said plaintiffs' petition and amended petition of record herein that one of said plaintiffs, to wit, Benjamin Fordyce, is and was at the time of the institution of this suit a resident and citizen of Hot Springs, in the State of Arkansas, and this defendant a resident and citizen of Sherman, in the State of Texas, and that this suit is not brought in the district of the residence of either said plaintiff, Benjamin Fordyce, or this defendant, and that the same is unlawfully brought against said defendant in this the eastern district of Missouri, and defendant objects and excepts to the jurisdiction of this court over him in this cause and says that it is without jurisdiction to hear and determine the matters whereof plaintiffs have in their petition and amended petition herein complained, as by their said petitions of record herein appears. Wherefore defendant now moves the court that this suit abate and that the same be now dismissed.

R. C. FOSTER &
A. E. WILKINSON,
Att'ys for Defendant.

That on the 20th day of March, 1889, said motion was called up for a hearing and was by the court taken under advisement,
52 and being fully considered by said court was, on the 21st day of March, 1889, sustained, and said petition then and there dismissed, and final judgment dismissing said cause for want of jurisdiction was rendered against plaintiff; to which ruling of the court in sustaining said motion to dismiss and rendering final judgment of dismissal against plaintiff plaintiff then and there excepted and still excepts, and prays that this bill of exceptions be signed and sealed by the court and made a part of the record in this case, which is accordingly done.

AMOS M. THAYER, *Dist. Judge.*

53 Know all men by these presents that we, C. H. Smith and Benjamin Fordyce, as principals, and R. C. Kerens, as surety, are held and firmly bound unto O. T. Lyon in the full and just sum of five hundred dollars, to be paid to the said O. T. Lyon, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the March term, A. D. 1889, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between C. H. Smith and Benjamin Fordyce, plaintiffs, and O. T. Lyon, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said O. T. Lyon, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of — next:

Now, the condition of the above obligation is such that if the said C. H. Smith and Benjamin Fordyce shall prosecute said writ to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

C. H. SMITH. [SEAL.]
BENJAMIN FORDYCE,
Per JEFFERSON CHANDLER, *Att'y.* [SEAL.]
R. C. KERENS. [SEAL.]

Approved by—
AMOS M. THAYER, *Dist. Judge.*

[Endorsed:] No. 2987. United States circuit court, eastern division of the eastern judicial district of Missouri. C. H. Smith *et al.* *vs.* O. T. Lyon. Bond, $500.00. C. H. Smith & Benjamin Fordyce, principals; R. C. Kerens, surety. Filed 9th day of May, 1889. A. P. Selby, clerk.

54

C. H. SMITH *et al.*
vs.
O. T. LYON.

Jefferson Chandler, R. H. Landale, and S. H. West, attorneys for plaintiffs; R. C. Foster and A. E. Wilkinson, attorneys for defendant.

Opinion of the Court.

MARCH 21ST, 1889.

BREWER, *C. J.:*

This is a motion to dismiss for want of jurisdiction. The facts are these: There are two plaintiffs. The allegation of the petition is that one plaintiff is a resident and citizen of the State of Arkansas and the other a resident and citizen of this State, and that the defendant is a resident and citizen of the State of Texas.

It is insisted that the suit cannot be maintained here because both plaintiffs are not residents of this district; neither is the defendant a resident.

The act of Congress of 1887 provides that where the "jurisdiction is founded only on the fact that the action is between citizens of

different States suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is insisted that the use of the words "the plaintiff" implies that all the plaintiffs must be residents, and the mere fact that but one of two plaintiffs having a joint interest is a resident does not give this court jurisdiction.

In the judiciary act of '89 the language in respect to jurisdiction and place of trial was "where an alien is a party or the suit is between a citizen of a State where the suit is brought and a citizen of another State."

And in the case of Strawbridge *vs.* Curtiss, 3 Cranch, 267, the Supreme Court, by Mr. Justice Marshall, considered the question as to whether an action could be maintained where all of the plaintiffs were not citizens of the State in which the action was brought. He expresses the opinion of the Court in these words: "The Court understands these expressions to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the Federal courts—that is, that where the interest is joint each of the persons concerned in that interest must be competent to sue or liable to be sued in those courts."

In the late case of Peninsular Iron Company *vs.* Stone, 121 U. S., 631, that case was cited and approved. It is familiar to all that in some of the statutes respecting the jurisdiction of the Federal courts and providing for removals the language is "any defendant" or "one having a separable interest." In other cases it is "the plaintiff" or "the defendant" or "the party."

The general and, I think I may say, the uniform construction placed upon these last expressions is that they are collective and include all who are plaintiffs or defendants, and that each must possess all the qualifications.

Following this line of decision, it seems to us that all the plaintiffs must reside in the district to enable them to sue, at least in a case in which all are jointly interested in a single cause of action.

In this case the action is on a contract made between two plaintiffs as partners and the defendant.

There is no separable controversy and but a single interest.

We think, therefore, that the motion is well taken and must be sustained and the case dismissed.

It is so ordered.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2287 of C. H. Smith and Benjamin Fordyce, plaintiffs, against O. T. Lyon, defendant, as fully as the same remains on file and of record in said case in my office.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this twenty-fourth day of May, in the year of our Lord one eighteen hundred and eighty-nine.

A. P. SELBY,
Clerk of said Court,
By GEO. F. HAID, *Deputy.*

[Endorsed:] No. 2987. United States circuit court, eastern division of the eastern judicial district of Missouri. C. H. Smith and Benjamin Fordyce against O. T. Lyon. Duly certified transcript of the record and proceedings in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 1164. C. H. Smith and Benjamin Fordyce, plaintiffs in error, *vs.* O. T. Lyon. Filed June 10, 1889.

Office Supreme Court U. S.
FILED,
OCT 24 1889
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

C. H. SMITH, ET AL.,
Plaintiffs in Error,

vs.

O. T. LYON,
Defendant in Error.

No 1164

DECLARATION IN THE CASE AS FILED BELOW.
MOTION TO DISMISS IN THE COURT BELOW.
OPINION OF THE COURT BELOW.
MOTION TO ADVANCE IN THIS COURT.
PROPOSITION TO SUBMIT ON BRIEF IN THIS COURT, TOGETHER WITH BRIEF ON THE MERITS.

JEFFERSON CHANDLER,
Attorney for Plaintiffs in Error.

LEVISON & BLYTHE STATIONERY CO., ST. LOUIS.

IN THE

Supreme Court of the United States.

C. H. SMITH, ET AL.,
Plaintiffs in Error,
vs.
O. T. LYON,
Defendant in Error.

THAT PART OF PETITION CONTAINING DECLARATION OF CITIZENSHIP AND RESIDENCE OF PARTIES.

C. H. SMITH AND
BENJAMIN FORDYCE,
Plaintiffs,
vs.
O. T. LYON,
Defendant.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.—March Term, 1889.

At this time come the plaintiffs herein, and for their cause of action against the defendant, and for amended petition herein filed by leave of Court, state that they are partners doing business under the firm name of C. H. Smith and Company; that said C. H. Smith is a resident

and citizen of St. Louis, in the State of Missouri, and the said Benjamin Fordyce is a resident and citizen of Hot Springs, in the State of Arkansas; that the defendant, O. T. Lyon, is a resident and citizen of Sherman, State of Texas. * * * *

JEFFERSON CHANDLER,
SAM. H. WEST,
R. H. LANDALE,
Att'ys for Plaintiffs.

MOTION OF DEFENDANT TO DISMISS.

C. H. SMITH AND
BENJAMIN FORDYCE,
Plaintiffs,
vs.
O. T. LYON,
Defendant.

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri. — March Term, A. D. 1889.

And now comes said defendant, O. T. Lyon, and specially appearing in the above entitled cause for the purpose of this motion only, and objecting to the jurisdiction of this Court over him, herein shows to the Court that it appears upon the face of said plaintiffs' petition and amended petition of record herein, that one of said plaintiffs, to wit: Benjamin Fordyce, is, and was at the time of the institution of this suit, a resident and citizen of Hot Springs, in the State of Arkansas, and this defendant a resident and citizen of Sherman, in the State

of Texas; and that this suit is not brought in the district of the residence of either said plaintiff, Benjamin Fordyce, or this defendant; and that the same is unlawfully brought against said defendant in this the Eastern District of Missouri; and defendant objects and excepts to the jurisdiction of this Court over him in this cause, and says that it is without jurisdiction to hear and determine the matters whereof plaintiffs have in their petition and amended petition herein complained, as by their said petitions of record herein appears. Wherefore, defendant now moves the Court that this suit abate and that the same be now dismissed.

R. C. FOSTER and
A. E. WILKINSON,
Att'ys for Defendants.

OPINION OF THE COURT.

C. H. SMITH, ET AL.,
vs.
O. T. LYON.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

BREWER, C. J.—This is a motion to dismiss for want of jurisdiction. The facts are these: There are two plaintiffs. The allegation of the petition is that one plaintiff is a resident and citizen of the State of Arkansas, and the other a resident and citizen of this State,

and that the defendant is a resident and citizen of the State of Texas.

It is insisted that the suit cannot be maintained here, because both plaintiffs are not residents of this district. Neither is the defendant a resident.

The Act of Congress of 1887 provides that where the "jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is insisted that the use of the words "the plaintiff," implies that all the plaintiffs must be residents, and the mere fact that but one of two plaintiffs having a joint interest is a resident does not give this Court jurisdiction.

In the judiciary act of 1889, the language in respect to jurisdiction and place of trial was "where an alien is a party or the suit is between a citizen of a State where the suit is brought, and a citizen of another State."

And in the case of Strawbridge vs. Curtiss, 3 Cranch, 267, the Supreme Court, by Mr. Justice Marshall, considered the question as to whether an action could be maintained where all of the plaintiffs were not citizens of the State in which the action was brought. He expresses the opinion of the Court in these words: "The Court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue or may be sued in the Federal Courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue or liable to be sued in those Courts."

In the late case of Peninsular Iron Company vs.

Stone, 121 U. S. 631, that case was cited and approved. It is familiar to all that in some of the statutes respecting the jurisdiction of the Federal Courts and providing for removals, the language is "any defendant," or "one having a separable interest." In other cases it is "the plaintiff" or "the defendant" or "the party."

The general, and I think I may say the uniform, construction placed upon these last expressions is that they are collective and include all who are plaintiffs or defendants, and that each must possess all the qualifications.

Following this line of decision, it seems to us that all the plaintiffs must reside in the district to enable them to sue, at least in a case in which all are jointly interested in a single cause of action.

In this case the action is on a contract made between two plaintiffs as partners and the defendant.

There is no separable controversy and but a single interest.

We think, therefore, that the motion is well taken, and must be sustained and the case dismissed.

It is so ordered.

MOTION OF PLAINTIFF IN ERROR TO ADVANCE.

C. H. SMITH AND OTHERS,
Plaintiffs in Error,
vs.
O. T. LYON,
Defendant in Error.

In the Supreme Court of the United States.—No. 1164.

Now at this day come the plaintiffs in error and move the Court to advance this cause on the docket of this Court; and for reason for such motion allege that heretofore, to-wit, on the 3d day of March, 1887, the Congress of the United States passed, and the President approved, an act, found on page 434, Vol. 25, United States Statutes at Large, affecting the jurisdiction of the Circuit Courts of the United States, the special provision thereof to which plaintiffs desire to call the special attention of the Court is in words and figures as follows, to-wit: "No civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

Plaintiffs further state in support of said motion, that the cause herein entitled came up before the Circuit Court of the United States for the Eastern Division

of the Eastern Judicial District of Missouri, on the declaration therein filed; and upon a motion of the defendant to dismiss the same for want of jurisdiction in the said Circuit Court, to proceed with said cause because it was alleged in said declaration that one of the persons plaintiff in said suit resided in the Eastern Division of the Eastern District of Missouri, and the other person plaintiff resided in the State of Arkansas. Both persons plaintiff constituted a partnership whose place of business was in the district where the suit was instituted; and service was had upon the defendant in said district. Which motion to dismiss is printed in full as a part of this motion.

The sole and only question passed upon by the Court below, and the sole and only question to be passed upon by this Court is the question of jurisdiction of the Circuit Court; which jurisdiction is objected to by the defendant on the sole ground that one of the persons plaintiff is a resident of the State of Arkansas; the defendant contending, and the Court below supporting him in that contention, that inasmuch as both persons plaintiff did not reside in the same district where the suit was brought, jurisdiction was wanting in the Circuit Court to entertain said suit, though the defendant was properly served within that district, and was a citizen of Texas.

Plaintiffs further state that the question of jurisdiction herein presented is, as plaintiffs are informed and believe, here brought to the notice of the Court for the first time under the statute above quoted; and the question whether the Circuit Court of the United States has jurisdiction under such circumstances, and what said

statute actually means is a matter of conflict and doubt, and of great public importance.

Plaintiffs say that the question of the jurisdiction of the Circuit Court of the United States, involving the construction of said statute, as it does, affects the jurisdiction of all the Circuit Courts of the United States alike.

The plaintiffs therefore feel justified, under the rules of this Court, in calling the attention of the Court to this case arising under said statute, and in making this motion to advance this cause, to the end that a true and correct construction of said statute may be given by this Court at an early day, thereby making clear what is now doubtful—the extent of the jurisdiction of the Circuit Courts of the United States where such jurisdiction is claimed on the sole ground of citizenship.

The petition stating plaintiffs' cause of action below, and the motion to dismiss the same, and the opinion of the Court thereon, accompany this motion to advance, and are printed in full herewith; together with the brief of the plaintiffs to sustain the jurisdiction of the Court below and to support plaintiffs' averment that the Court below erred in sustaining defendant's motion to dismiss for want of jurisdiction; which error of the Court in dismissing said petition for want of jurisdiction is the error complained of.

And as a part of this motion plaintiffs in error herewith file brief on the merits, and beg leave to submit this case when advanced on brief, copy of which, together with this motion, has been served upon the other party to this suit, conformably to the ruling of this Court.

JEFFERSON CHANDLER,
For Plaintiffs in Error.

BRIEF AND ARGUMENT TO SUPPORT MOTION TO ADVANCE.

C. H. SMITH, ET AL.,
Plaintiffs in Error,
vs.
O. T. LYON,
Defendant in Error.

In the Supreme Court of the United States.—No. 1164.

Plaintiff C. H. Smith is a resident of St. Louis, Mo. Plaintiff Benjamin Fordyce is a resident of Hot Springs, Ark. The defendant, O. T. Lyon, is a resident of Sherman, Texas. Suit was brought and defendant served in St. Louis, Mo. The defendant moved to dismiss for want of jurisdiction of the parties. Motion was sustained, the Court holding that in the Act of March 3rd, 1887, the use of the words "the plaintiff" means all the plaintiffs, and that all the plaintiffs must be residents of the district where the suit is brought. Plaintiffs move for a rehearing.

To sustain said motion plaintiffs submit the following suggestions and authorities:

1st. The seat of jurisdiction in this case is found in that provision of the Constitution of the United States which declares that the judicial power of the United States extends to all controversies between citizens of different States: Cooley's Constitutional Limitations, page 15.

The judicial power of the government and of this

Court is broad enough to cover the subject matter of the case made in the petition filed herein, for said petition discloses a controversy between citizens of different States. The Act of Congress, of 1887, provides that where the jurisdiction is founded on the fact that the action is between the citizens of different States, suit shall be brought "only in the district of the residence of either the plaintiff or the defendant." It is claimed for this statute that it limits the field over which the judicial power of the United States Courts is extended by the Constitution and statute, to districts wherein the plaintiff resides or the defendant resides. It is not claimed that the case does not fall within the judicial power of the Federal Courts as to its subject-matter, but that it is not brought at the place where the statute permits such controversies to be heard. It is said that it is not at the proper place because neither the plaintiff nor the defendant resides in the district where this suit was brought. It is admitted to be a controversy between citizens of different States, but it is said that though one person, who is plaintiff, resides in the district where the suit is brought, that it is not properly brought, because there are two persons plaintiff, both of whom do not reside in the district where suit is brought. It is admitted that if C. H. Smith, one plaintiff, was the only plaintiff in the suit, the law is satisfied and the controversy could be heard in the Court of the district where suit was brought. Although the Constitution holds open the Federal Jurisdiction to citizens of different States without limitation, yet it is claimed that the statute must be so construed as to impair the right of

Smith to bring this identical suit, though interested in its entirety, because Mr. Fordyce, also a citizen of a different State from that in which the defendant resides, is interested with Smith as a partner. It is submitted that this construction is technical and against the very spirit of the Constitution. Where the judicial power of a Court is general, and its jurisdiction is general between certain classes of people, and all parties to a controversy fall within the class to which such judicial power extends, it would seem that there ought to be something more than an implication against jurisdiction of the person, to justify the withdrawal of this general jurisdiction of the Court, in a particular case. In other words, that the statute ought to be construed to help out the general jurisdiction, instead of to limit the general jurisdiction.

The statute of 1887 first defines the jurisdiction of the Circuit Courts of the United States, and declares in the language of the Constitution of the United States, that jurisdiction extends to controversies between citizens of different States. The subordinate part of the statute, which is relied upon to oust the jurisdiction of the Court in this case, relates only to the place where such controversy should be introduced into Court.

The controversy to be heard must be and is between citizens of different States. The controversy set up here is precisely the one described in the statute conferring jurisdiction upon this Court. The subject of jurisdiction, then, being the primary and substantive matter upon which the statute and all its provisions is to operate, that part of the statute fixing the place

where the controversy may be heard should not receive such a rigid and technical interpretation as to limit the former part of the statute defining the jurisdiction of the Court over the subject matter.

In Silver vs. Ladd, 7th Wallace, 226, where it was provided that occupants of public land above the age of eighteen years should have certain privileges, the statute declared that one-half section, or 320 acres, should be allowed, if a single man; and if a married man, 640 acres; thus, if this provision were controlling, limiting the occupants of land to single or married men. An unmarried woman undertook to avail herself of the privileges of this Act, and the Courts say: "We admit the philological criticism that the words single man and married man, referring to the conjugal relations of the sexes, do not ordinarily include females." The statement might have been much stronger, and could have been that these expressions do not under any circumstances include females, but the Court says further: "The language of the statute is 'every white settler or occupant of the public lands above the age of 18 years,' &c., could have these privileges," just as this statute says that the jurisdiction of this Court extends to controversies between citizens of different States; and this general language was not to be limited by that further provision which declared what a single man might take up and also what a married man might take up, but that it included a woman as well; simply because the reason of the statute in its entirety required this interpretation.

In the United States vs. Saunders, 22 Wallace, 492, it is said: "A statute is to be interpreted not only

by its exact words, but also by its apparent general purpose. If its general purpose have plain reference to one class of persons, it will not include a single individual in a distinct class though the mere words might include him." Hence, this statute should not be interpreted upon the single word plaintiff alone, but, the purpose of the Constitution being to extend the judicial power of the Federal Government to all controversies between the citizens of different States, and this purpose being clear, and the purpose of this very Act being equally clear, to confer jurisdiction upon the Circuit Court of the United States to hear such controversies between citizens of different States, that purpose is sovereign in interpreting this statute. And if any part of the statute taken by itself seems to subtract from that jurisdiction and that purpose, such subtraction should not be allowed, but the general spirit and purpose of the Constitution and of the statute carrying it into execution should dominate. If Mr. Fordyce stood alone he could sue this defendant in the Federal Court in Arkansas, if the defendant could there be served as he has here been served. If Mr. Smith stood alone in this controversy he could maintain this suit where it is now pending. Both persons as plaintiff could go to Texas and there institute suit on this cause of action in the Federal Court in Texas. So that it is a controversy to which Federal Jurisdiction extends its hospitality; and whether it be brought in Arkansas in the Federal Courts, or in Missouri in the Federal Courts, or in Texas in the Federal Courts, is a matter of slight importance; all such Courts being equal in contem-

plation of law; all exercising the same powers; all being a part of a system, which system is a unit. We submit that the mere ambiguous designation of a place where this general jurisdiction can be exercised should not be allowed to shrink up the general jurisdiction of the Circuit Courts over the subject matter so unequivocally given by the statute. The interpretation of this law, given in this case, we respectfully submit, operates to neutralize and destroy the value of the entire statute. If there were two defendants living in different States and two plaintiffs living in different States from each other and from the defendants in the suit, no suit could be brought in the Federal Court, although the subject matter of the suit was a controversy between citizens of different States, and the statute extends the jurisdiction of the Federal Court to all controversies between citizens of different States. It may be said that one defendant might be sued and the other omitted, but in many cases this would be only a partial settlement of the controversy, because all parties interested in certain cases ought to be brought before the Court in order to make the judgment of the Court upon the controversy conclusive. The jurisdiction of the Court extends to the whole controversy, not to a part of the controversy existing between one plaintiff and one defendant, but to the entire controversy, and brings before the Court by implication at least at the place designated all persons interested in the controversy, and whose presence is necessary in the Court to finally and forever settle that controversy. It is jurisdiction of the controversy which the Court

has, and of the entire controversy. That must include jurisdiction of all the parties interested in the controversy, where they can be served or where they appear in Court. The law works no limitation upon the jurisdiction except to fix the place where it should be exercised. If one plaintiff or one defendant reside in the district where the suit is brought, and it is a controversy between citizens of different States, then the Court where it is brought under this statute has jurisdiction of it to render final and complete justice between the parties to that controversy appearing in Court.

We make these suggestions because this is a pioneer case, the point never having been determined so far as we can learn by any other Court; and because, further, we respectfully submit, that the statute is given in this case a technical construction as distinguished from a liberal one, which the whole body of the statute seems to require.

The Circuit Court would not probably hold that if two defendants were sued in the jurisdiction and voluntarily appeared and answered, that the controversy could not proceed to be there disposed of. If the suit might be brought and maintained against two defendants in a district where one of them resides, and the other one was served and entered his appearance without objection, then this suit can proceed because the statute limits the jurisdiction to places where the defendant resides as well as to the places where the plaintiff resides. Could the defendant, living in his district and properly sued there, object to the jurisdiction of the Court because his co-defendant lived elsewhere, but was served in this jurisdiction and was willing to

go forward to an adjudication of the case? This statute will be construed with reference to the right of one defendant to waive the proper service upon him and to appear in a Court where he need not appear did he not so elect to do. That is a general principle of practice prevailing prior to the existence of this statute, and this law will not be held to repeal that general principle of practice. The Court having jurisdiction of the subject-matter of all controversies between citizens of different States, and that provision of the law locating the place where the suit should be brought having more application to the service of the process or to the situs of the parties than to jurisdiction over the subject-matter of the controversy, will be construed in harmony with the general principles of practice prevailing at the time of its enactment, and which are not in any way alluded to in the statute or repealed by it. If the Court would not hold that if two persons were sued as defendant, one of them living out of the district where the suit was brought and voluntarily appearing, the case could not go on we respectfully submit the decision in this case is too technical under the statute. The construction of this statute allows the parties defendant to defeat a jurisdiction which the plaintiff has a legal right to have maintained. Suppose the defendants were co-partners; one of them resides in Texas, the other in Arkansas. The plaintiff goes to Arkansas and brings a suit and serves it upon the defendant there residing, and discloses in his petition that he sues upon a joint obligation existing against the defendant sued and another one in Texas. The Arkansas party has no defence

to the suit whatever; neither has the Texas party. The Arkansas party therefore procures the Texas party to come forward and enter his appearance as a defendant and to accept service of the process. What would the Court do in such a case? The whole controversy is before the Court as well as the parties to it. It is such a controversy as the statute authorizes the Court to adjudicate. Would it order the defendant, who has voluntarily entered his appearance, out of Court? Or would the Court entertain his appearance as a defendant and dismiss the whole case for want of jurisdiction? It has been held in the Circuit Court that a citizen of Illinois might file his bill or petition in the Circuit Court of the United States against a citizen of New York, and if he could serve the New York party in the district, or the New York party voluntarily entered his appearance, that, though the Court has no jurisdiction of the defendant without such appearance of the defendant, yet such appearance being made, the Court having jurisdiction of the subject matter could go on and finally settle the controversy between the parties. This is not giving the Court jurisdiction of the subject-matter by consent, but of the person only, the defendant voluntarily appearing, submitting himself to the jurisdiction of the Court, and is bound by it. We insist that the same principle of practice prevails under this statute. If two defendants are sued in one district; one is served, and the other lives in a distant State and comes forward and surrenders himself to the jurisdiction of the Court, judgment can be rendered against him, and the jurisdiction of the Court is perfect.

These suggestions are sustained as to the right of a defendant not served and not living in the district where the suit is instituted to appear and cure any infirmity in the jurisdiction of the Court so far as the defendants are concerned, by the case of Jones vs. Andrews, 10th Wallace, pp. 331 and 332. The law in that case providing for suits between citizens of different States declared,—"That no civil suit should be brought before said Court against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The Court say the case is certainly not within the purview of this statute." The Court say further, however, that the law by implication confers jurisdiction if the non-resident defendant voluntarily appears. In that case the non-resident defendant was a necessary party to the suit and the suit could not proceed without him, and the jurisdiction failed without his appearance. He did appear, and the Court say,—"After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court dismissing the bill for want of jurisdiction must be reversed." The Court held in that case that the defendant properly sued could not object to the appearance of the foreign defendant in order to defeat the jurisdiction of the Court; that only the person who need not appear but who did appear could raise the question of the want of jurisdiction over him. Under the present statute, as constructed in the opinion rendered in this case, no appearance of a defendant in any district where he was not a resident would be per-

mitted, and if he was a necessary party to the suit, as the two persons plaintiff are in this case, as in many cases he would be, the jurisdiction would be defeated, although the non-resident defendant was perfectly willing to appear and submit himself to the jurisdiction of the Court where the suit was actually brought. Is not such a construction of this statute too technical, and does it not operate to defeat the real purpose for which the Federal Courts were set up? As was said in the case of Pond vs. Vermont Valley R. R. Co., 12 Blatchford, 288-289, reported in 11 Myers, Fed. Decisions, 913.

"Cases might often arise in which it was of the utmost importance to citizens of one State to bring suit in the United States Court in another State, where the matter in controversy arose, or the property or fund in question was situated, and where the principal defendants reside. When such a suit was brought against defendants residing in the State where it was brought, was there a want of jurisdiction of the action itself, if it appeared that some other person, a citizen of a third State, was a necessary party? I think not. The Court might not be competent to make a decree in the absence of such party, but that would be not because the Court was not competent to take jurisdiction of the action, but because it had not jurisdiction of all the parties to the action which were necessary before the Court could act upon the subject of the controversy." * * * * * * * "The supposed defective jurisdiction in such case pertains to the jurisdiction of the person and not the jurisdiction of the action; and it is not for a

citizen of Vermont, who is rightly proceeded against, to say that the Court has no jurisdiction of the action because another person who is defendant with him, but who appears and answers to the merits without objection, resides in another State." * * *
"It does not prevent their voluntarily appearing and submitting to the jurisdiction in such a case." The Court rendering this opinion, cites the case of Strawbridge vs. Curtis, and holds that it is not analogous, and many other cases also. If a defendant, not a resident, can give jurisdiction to the Court under this statute in case where he is a necessary party, what is the legal reason that one of the plaintiffs, not residing in the district where the other plaintiff resides, may not also come in as a plaintiff? The alleged want of jurisdiction in this case is of the parties only, and not of the subject matter, and the law locating the place of suit rests upon the supposed convenience of the parties litigant; and jurisdiction of the parties in such cases may be given by the consent of the parties themselves.

Further, it seems to us that there is another consideration of weight in favor of this jurisdiction. The contract in the suit is said to be a joint contract, to enforce which all obligees must join as plaintiff, as is said in Bliss Code Pleading, page 62: "There being no several interests, the whole right must be vindicated at once, and this could not be done without the presence and only on the request of all interested in that right; that is, all the living joint obligees. Although one of the claimants or obligees has in theory a right to whole, yet every other claimant has

the same right. A judgment in favor of one for the whole claim would deprive others of their right. A judgment for a part would be inconsistent with the idea of a joint right; hence all must recover, and jointly or none. The adjustment among themselves required a proceeding with which the Courts of law had nothing to do," &c.

The Court ought to look at this case as though no other system of Courts than the Federal Courts existed. Looking at the subject in that light: Here is a plaintiff, citizen of one State, who has a controversy with a citizen of another State, and has served the citizen of that other State according to law. A joint right with another to relief against a third person is just as sacred in law as a several right. If Smith was enforcing a several right the jurisdiction would be complete; but he is just as much entitled to protection in a joint right as in a several right. As is said by Bliss: "In theory he has a right to the whole." The construction of the statute given in this case deprives Smith of all remedy in this case. The jurisdiction of this Court is no greater under this statute, nor no less, because State Courts exist. Smith is a citizen of one State and has a controversy against a citizen of another State. In that controversy a citizen of a third State also has an interest. The obligation becomes worthless by a failure of remedy in the Federal Courts under the construction given to this statute, not because there is any defense to the claim, but because those jointly interested in the claim, though they voluntarily appear in the Court as the residence of one of them, reside in different dis-

mences a personal action or suit to obtain a remedy for an injury to his rights; opposed to defendant." The word merely represents in law the aggregate of persons complaining as a party to the contract sued on against another person or persons who may be described as defendant or defendants; and where the jurisdiction depends upon residence, the residence of either person holding an interest in the entirety satisfies the statute, and is the residence of the plaintiff called for by the statute. The word plaintiff may as well and does in law represent a collection of persons as a single individual. A corporation is composed of many persons who become in law unified under the name which they have adopted for the corporation of which they compose the constituents. A partnership is a unit, though made up of a multitude of persons, and the word plaintiff in law actually describes a corporation, though there may be thousands of persons interested alike in it. The word plaintiff in law describes a co-partnership with perfect accuracy, though many persons compose the partnership. This is a partnership controversy, and the plaintiff described the situs and residence of the partnership in making the contract to be in the district where this suit is brought. It would be proper to speak of the United States in the plural, and it would be equally proper to speak of the United States as a unit and as one. So the word army may describe a large number of distinct military organizations. If the word plaintiff is used here as the parties themselves used it, no difficulty arises about maintaining the jurisdiction of the Court in this case. A word in the singular may re-

present a mass as well as a word in the plural, and where the logical and legal relation of the mass is such that in law the mass becomes a unit, it is proper in a legal controversy in vindicating the rights of that mass to describe it as a plaintiff.

It is submitted that the jurisdiction of the Federal Court ought not to be frittered away on a shadowy difference in meaning between the word plaintiff used in the singular and the word plantiffs used in the plural. There are, in fact, no plaintiffs in this case; but one plaintiff: and the residence of that plaintiff the partnership, was agreed upon at the time the contract was made; and is, in fact, the residence and place of business of the partnership to-day; and it is in the district where this suit is instituted.

There is no difference in principle between the willingness of the Courts to vindicate a contract made by a co-partnership and a contract made by a corporation. A co-partnership is an initial association of persons for business purposes under a co-partnership name. A corporation is a legal association of a multitude of persons under a corporate name. It is said in Paul vs. Virginia, 8th Wallace, 877,—"Where contracts or rights of property are to be enforced by or against corporations, Courts will consider the corporation as representing citizens of the State under whose laws it was created, and to this extent will treat a corporation as a citizen within the constitutional clause extending jurisdiction of the Federal Courts to controversies between citizens of different States." A corporation, then, is by the Courts considered a citizen of the State under whose laws the corporation was created. The

partnership in this case was created under the laws of the State of Missouri, and the contract of partnership described the situs of it in St. Louis, in this district. In the case of Muller vs. Douse, 4th Otto, 444-445, the Court held that a consolidated corporation formed of companies created by two or more States, is a citizen of each. This definition of the situs of such a corporation was given by the Court for the purpose of getting jurisdiction and maintaining it to vindicate the rights of parties dealing with corporations.

The decision in the case in which this brief is filed allows an implication to exclude a partnership from its presence, though it has agreed upon a situs for itself; while the same Court in the vindication of contracts made by a corporation would, if necessary in order to maintain jurisdiction, declare such a corporation to have a double citizenship under certain circumstances. In the case of the partnership the doctrines of this decision rejects it though a legal unit under precisely the same circumstances it would be accepted as a proper party if it were a corporation. We submit that a partnership is entitled to as liberal a construction of the laws in its favor and to as much of the benefits of the jurisdiction of the Federal Courts, as is a corporation; and that where the question of the jurisdiction rests in ambiguity affecting only the parties to the suit and the place of suit, and not the subject-matter, liberal construction of the statute is more consonant with justice than a technical and restricted construction of the statute.

We insist that the doctrine of waiver applies to this case, and that if there were two defendants, one re-

siding in a different district from where the suit is brought, he could come in under this statute and waive service and the Court would have jurisdiction over him. The language of the statute is precisely the same with regard to the residence of the defendant as it is with regard to the residence of the plaintiff. If one defendant can waive jurisdiction, one plaintiff may fail to object where the suit is brought at the residence of the other; and it is for him alone to object, and not for the defendant who is rightfully summoned.

It is respectfully submitted that though the general language of the Court in the case of Strawbridge vs. Curtis, 3rd Cranch, p. 367, seems to justify the decision rendered in this case, yet that language was used with reference to the facts in that particular case, and must be limited to the particular question there submitted. The Courts say that "Where the interest is joint, each of the persons concerned in that interest must be competent to sue or be liable to be sued in these Courts." The particular case the Court was there considering arose from the fact that the complainants were citizens of the State of Massachusetts, and defendants were also citizens of Massachusetts, except one. Hence, the suit was between citizens of the same State where the suit was brought, and the interest being joint and the controversy indivisible, the rights of the plaintiff in that case could not be settled as against the defendant Curtis, who was a resident of Vermont, without also settling the controversy between the other defendants who were citizens of Massachussets; hence the suit in the Straw-

bridge case was a suit between citizens of the same State, to-wit: of the State of Massachussetts. The facts in this case are not the facts in that case. If Mr. Fordyce, one of the persons plaintiff, or Mr. Smith, one of the persons plaintiff, resided in Texas, the doctrine of the Strawbridge case would apply. The same thing is said in the case of the Peninsula Iron Co. vs. Stone, 121st U. S., p. 631; there it is said: "There is but a single cause of action, and while all the complainants need not have joined in enforcing it, they have done so, and this under the rule in the New Orleans vs. Winter, controls the jurisdiction. It is therefore a suit to which the citizens of Ohio are parties on one side and citizens of Ohio are parties on the other, with interests so conflicting that the relief prayed cannot be had without keeping them on opposite sides of the matter in dispute." This case rests on the same principle as the other, and defeated the jurisdiction because the plaintiffs and defendants were citizens of the same State. To support this doctrine, Barney vs. Baltimore, 6th Wallace, is cited in the case in 121st U. S. There it was held that a citizen of the District of Columbia was not a citizen of a State, and therefore was not qualified to sue in the Federal Court under any circumstances. The case of Coal Co. vs. Blatchford, 11th Wallace, 175, is also cited in 121st U. S. That case was against a Pennsylvania corporation as defendant, and was brought by one of two parties who was himself a citizen of Pennsylvania. Hence, in that case, one plaintiff and the defendant were citizens of the same State. The next case cited in 121st U. S. is entitled the case of Sewing Machine Co.s,

reported in 18th Wallace, 553, in which case one defendant was a citizen of the same State as the plaintiff. In the case of Marshall vs. B. & O. R. R. Co., 16th Howard, 326, it is said: "By the Constitution, the jurisdiction of the Courts of the United States is declared to extend, inter alia, to controversies between citizens of different States." The Judiciary Act confers on the Circuit Courts jurisdiction in suits between a citizen of the State where the suit is brought and a citizen of another State. The reason for conferring this jurisdiction on the Courts of the United States, are thus correctly stated by a contemporary writer, (Federalist, No. 80). "It may be esteemed as the basis of the Union, that citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities. the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens?" On page 227 it is said,—"If the United States Courts could be forced into the State Courts without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution; and in many cases be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suits must be tried, and to contend with powerful corporations where the chances of impartial justice would be greatly against them; and where no prudent

man would engage with such an antagonist if he could help it." On page 329 it is said,—"The right of choosing an impartial tribunal is a privilege of no small practical importance." This case is cited to show that the purpose of giving jurisdiction to the Federal Courts was to secure to persons residing in different States an impartial tribunal; and that, where a suit was brought between citizens of the same State, the reason for the jurisdiction did not apply. In the case at bar, however, each party to the controversy is a citizen of a different State from the others, and hence the reason for the jurisdiction in this case is manifest. In that case it was held, that it was not sufficient to oust the jurisdiction of the Federal Court to show that some of the directors of the corporation party to the suit resided out of the State where the corporation claimed its citizenship.

The case at bar differs from all the cases relied upon by the defendant to oust the jurisdiction in this case, in this: All such cases show that parties plaintiff and parties defendant are citizens of the same State; and in no case cited does it appear that the parties plaintiff and parties defendant, as in this case, are citizens of different States. The reason of the Constitution for establishing jurisdiction did not apply in those cases; the reason for maintaining the jurisdiction in this case does nourish and sustain that jurisdiction, and the reason of the law is the governing force in the intrepretation of the law, and not the letter of the statute alone.

The case of Ballin, et al., vs. Lehr, et al., 24th Federal Reporter, page 193, seems to support our

view of the case in principle, which is as follows: "One of the plaintiffs is a citizen of New York, and the other of New Jersey; one of the defendants is a citizen of Maryland and the other a subject of Prussia. The act of 1875 (Supp. Rev. St., 174) makes suits removable in which there is a controversy between citizens of States, or between citizens of a State and foreign citizens or subjects. There are no citizens of the same State, nor citizens or subjects of the same foreign country, on opposite sides of the controversy in this suit. Each person on one side is a citizen of a State; and each person on the other is a citizen of another State or country. The statute uses the plural number only, but this includes the singular, and does not imply that there must be more than one citizen of the same State on one side of every controversy to make the suit removable. A suit in favor of one citizen of one State against one citizen of another State, or an alien, would be none the less removable because there were not more than one of each class. There is no person here, as a party to this controversy or suit, who is not within the description of the statute as to all his opponents. There is no occasion for severance of causes of action or parties; the statute covers the whole." (Removal Cases, 100 U. S. 457.)

In addition to this decision, we call attention to the dissenting opinion of Judge Bradley in Removal Cases, 100 U. S., page 479, which discloses somewhat the different views taken of the jurisdiction of the Federal Courts on the ground of citizenship, and gives something of the history of the controversy in Court over

such jurisdiction. Judge Bradley goes away beyond sustaining this case. We think that the opinion from which he dissents in principle clearly holds that the subject-matter of the suit at bar is within Federal jurisdiction. Whereas the decision cited by our adversary rests upon the finding of the Court that the subject-matter was not within the jurisdiction of the Court. Neither of the cases cited turn upon the question of the jurisdiction of the Court over the parties. All the cases cited were determined upon by the adjudication of the Court that the controversy was not such as the Constitution or laws gave the Federal Court jurisdiction of. In this case the controversy is such a one; and the only trouble is about the residence of the parties to it.

It was held in Removal Cases, 100 U. S., page 457, by a majority of the Court, and reiterated in the case of the Pacific R. R. Co. vs. Ketchum, in 101 U. S., page 298: "If in such arrangement it appears that those on one side are all citizens of different States from those on the other, jurisdiction might be entertained and the case proceeded with." That ruling, we think, applies as well to the first section as to the second. In that case it will be noticed that the defendants are citizens of Missouri and of New York and of Rhode Island, and the plaintiffs are citizens of New York and Massachusetts. Hence, there was a case where persons plaintiff and persons defendant were from different States, and the Court retained the jurisdiction. If such a controversy should arise now, under the construction which this Court gives to the law of 1887, the jurisdiction could not be retained,

though the Court primarily had jurisdiction of a controversy between citizens of different States, yet if that controversy is shrunk up by this statute to a controversy with citizens of one State as plaintiff and citizens of one State as defendant, the Court would lose jurisdiction if it appeared in the course of the litigation of the controversy that citizens of other and distinct States as defendants were necessary parties, and citizens of other and distinct States from those wherein the plaintiffs bringing the suit resided were necessary parties plaintiff. This would operate to defeat the jurisdiction of the Federal Courts in all great complex controversies wherein that jurisdiction is most serviceable to the parties appealing to it, such as the controversy set up and described in the case referred to in 101 U. S.

We submit that this construction of the statute is too narrow and operates to abridge and practically annul the jurisdiction of the United States Courts in controversies between citizens of different States in all cases wherein there are more than one defendant or one plaintiff and the different plaintiffs reside in different States from each other, though different from the defendant. To circumscribe the jurisdiction to these limits was not the purpose of this statute; but the object was to leave the jurisdiction open and complete under this statute as it had heretofore been, and to fix the situs and location of the suit in order to suit the convenience of the parties litigant.

JEFFERSON CHANDLER,
Att'y for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
NOV 8 1889
JAMES. H. McKENNEY.
CLERK.

IN THE SUPREME COURT

OF THE UNITED STATES.

C. H. SMITH ET AL.,

PLAINTIFFS IN ERROR,

VS.

O. T. LYON,

DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

R. C. FOSTER,

ATTORNEY FOR DEFENDANT IN ERROR.

MURRAY'S PRINT, DENISON, TEXAS.

In the Supreme Court of the United States

C. H. SMITH ET AL.,
Plaintiffs in Error.

vs.

O. T. LYON,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The question presented in the record here is whether under a statute which provides that "Suit shall be brought only in the district of the residence of either the Plaintiff or the Defendant," such suit can be maintained, over Defendant's objection, in a district where one of several jointly interested Plaintiffs resides.

This statute, it seems to us irrespective of authority, admits of but one construction. Neither of these parties can properly be separately characterized as *the Plaintiff* in the suit. It is clear that one of them alone could not maintain the action, and there is no apparent reason why he should have any greater right because of his partnership with another who if alone might maintain it. The interest is a joint and inseparable one and it is just as necessary that one of the prosecuting plaintiffs should be entitled to sue as another.

But authorities are not wanting upon the question here presented and the opinion of the Court below printed with brief of attorneys for Plaintiff in error, follows the line of decisions in this Court on such question. In Strawbridge et al. vs. Curtiss et al. (3 Cranch, 267) it is expressly held that "when the interest is joint *each* of the persons concerned in that interest must be competent to sue, &c." In Coal Company vs. Blatchford (11 Wallace, 172) Mr. Justice Field, delivering the opinion of this Court, says in reference to the language of the eleventh section of the Judiciary Act of 1789 designating the parties: "The designation of the party Plaintiff or Defendant is in the singular number, but the designation is intended to embrace all the persons who are one side,

however numerous, so that each distinct interest must b
represented by persons all of whom are entitled to sue o
are liable to be sued in the Federal Courts. In othe
words, if there are several Co-Plaintiffs, the intention o
the act is that *each* Plaintiff must be competent to sue.
The foregoing and other authorities cited in the opinion
the Court below, would seem to leave no room for doub
as to the correctness of that opinion.

The construction given to the statute in the Circu
Court is not narrow nor technical, but in line with th
general policy of the act as to the district where sui
shall be brought. The general rule is that no civil su
shall be brought against any person in any other distri
than that whereof he is an inhabitant. The provisio
which permits a Defendant to be sued also in the distri
of the residence of the Plaintiff, in cases where the juri
diction is founded only on the fact that the action is b
tween citizens of different states, is an exception to th
right which is accorded to Defendants in all other case
and ought not to be extended further than the terms o
the statute require. To give to several or numerou
Plaintiffs the privilege of selecting among the variou
districts which some one of them may inhabit the on
which would be most disadvantageous to the Defenda